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Considered and distinguished. *In re* Parsons. Barnsdale & Smallman *v.* Parsons **Bennett J. 973**

*Di Savini* v. *Lousada* - (1870) 18 W. R. 425.
Restricted. *In re* B——'s Settlement. B—— *v.* B—— **Morton J. 54**

*Doe d. Blesard* v. *Simpson* (1842) 3 Man. & G. 929.
Considered. *Ex parte* Midland Ry. Co. *In re* Estate of Thomas Milward (Deceased)
**Farwell J. 698**

*Doe d. Smith* v. *Webber* (1818) 1 B. & Ald. 713
Considered. *Ex parte* Midland Ry. Co. *In re* Estate of Thomas Milward (Deceased)
**Farwell J. 698**

*East Fremantle Corporation* v. *Annois* [1902] A. C. 213.
Observations of Lord Macnaghten at p. 217 explained and reconciled with statement of law by Lord Dunedin in *Manchester Corporation* v. *Farnworth* [1930] A. C. 171, 183. Approved by Clauson L.J. Provender Millers (Winchester), Ld. *v.* Southampton County Council
**Farwell J. and C. A. 131**

*Eaves, In re. Eaves* v. *Eaves* [1939] Ch. 1000
Affirmed - - - - **C. A. 109**

*Eccles Provident Industrial Co-operative Society, Ld.* v. *Griffiths* [1912] A. C. 483.
Observations at p. 490 adopted. *In re* Barnes. Ashenden *v.* Heath - - - **Farwell J. 267**

*Emden* v. *Carte* - - (1881) 19 Ch. D. 311
Followed. *In re* Clayton. Collins *v.* Clayton and Reade
**Morton J. 539**

*Engelbach's Estate, In re* - [1924] 2 Ch. 348
Distinguished. *In re* Gordon. Lloyds Bank & Parratt *v.* Lloyd & Gordon - - **Simonds J. 851**

*Evans* v. *Chapman* [1902] W. N. 78; 86 L. T. 381.
Discussed and followed. Scott *v.* Frank F. Scott (London), Ld.
**Bennett J. 217**

*Evans* v. *Chapman* [1902] W. N. 78; 86 L. T. 381.
Approved. Scott *v.* Frank F. Scott (London), Ld. and Others
**C. A. 794**

*Farmer, In re* - - - [1939] Ch. 573
Followed. *In re* Wilson (Deceased). Hartley *v.* Marie Curie Hospital - - **Bennett J. 966**

*Firth, In re. Sykes* v. *Ball* [1938] Ch. 517
Considered. *In re* Henderson. Public Trustee *v.* Reddie and Others - - **Morton J. 368**

*Foley* v. *Burnell* (1783) 1 Bro. C. C. 274; (1785) 4 Bro. 319.
Rule in, applied. *In re* Coote. Cavers and Evans *v.* Kaye and Others - - **Morton J. 549**

*Fothergill's Estate, In re* [1903] 1 Ch. 149
Considered. *In re* Coote. Cavers and Evans *v.* Kaye and Others
**Morton J. 549**

*Gosling* v. *Gaskell* - [1897] A. C. 575
Applied. *In re* Courts (Emergency Powers) Act, 1939, and *In re* Brown (S.) & Co. (General Warehousemen), Ld.
**Bennett J. 961**

*Greer* v. *Young* - (1883) 24 Ch. D. 545
Followed. *In re* Clayton. Collins *v.* Clayton and Reade
**Morton J. 539**

*Gunther's Will Trusts, In re. Alexander* v. *Gunther* [1939] Ch. 985. Followed. *In re* Oram. Oram *v.* Oram - - **Bennett J. 1001**

*Halkett* v. *Dudley (Earl)* - [1907] 1 Ch. 590 Applied. Cleadon Trust, Ld. *v.* Davis - - - - **C. A. 940**

*Hearts of Oak Assurance Co.* v. *Att.-Gen.* [1932] A. C. 392. Applied. *In re* Gaumont-British Picture Corporation, Ld. **Crossman J. 506**

*Howard* v. *Wheatley* (1853) 3 D. M. & G. 628, 646. Applied. Scott *v.* Frank F. Scott (London), Ld. and Others **C. A. 794**

*Howe* v. *Lord Dartmouth* - (1802) 7 Ves. 137 Rule in, applied. *In re* Fawcett. Public Trustee *v.* Dugdale **Farwell J. 402**

*Irving's Yeast-Vite* v. *Horsenail* (1934) 50 T. L. R. 205; 51 R. P. C. 110. Discussed. Bismag, Ld. *v.* Amblins (Chemists), Ld. - **Simonds J. 225**

*Irving's Yeast-Vite, Ld.* v. *Horsenail* (1934) 103 L. J. (Ch.) 106. Held to be overruled. Bismag, Ld. *v.* Amblins (Chemists), Ld. **C. A. 667**

*Kempthorne, In re* - [1930] 1 Ch. 268 Applied. *In re* Gordon (Deceased) Watts *v.* Rationalist Press Association, Ld. **Bennett J. 769**

*King Features Syndicate Incorporated and Another* v. *O. & M. Kleeman, Ld.* [1940] Ch. 523. **Reversed C. A. 806**

*Knight, In re* - - -[1892] 2 Ch. 368 Distinguished. *In re* Clayton. Collins *v.* Clayton and Reade **Morton J. 539**

*Lambert, In re. Corns* v. *Harrison* [1908] 2 Ch. 117. Followed. *In re* Birchall. *In re* Valentine. Kennedy *v.* Birchall **C. A. 424**

*Landi, In re. Giorgi* v. *Navani* [1939] Ch. 828. Followed. *In re* Milking Pail Farm Trusts. Tucker *v.* Robinson - - **Farwell J. 996**

*Lapish* v. *Braithwaite* - [1926] A. C. 275 Applied to construction of Companies Clauses (Consolidation) Act, 1845, s. 85. Wilson *v.* London Midland and Scottish Ry. Co. **Simonds J. 169**

*Lewis, In re* - - - [1918] 2 Ch. 308 Considered. *In re* Coote. Cavers and Evans *v.* Kaye and Others **Morton J. 549**

*Loring* v. *Thomas* - (1861) 1 Dr. & Sin. 497 Followed. *In re* Birchall. *In re* Valentine. Kennedy *v.* Birchall **C. A. 424**

*Luck's Settlement Trusts, In re. Luck's Will Trusts, In re. Walker* v. *Luck and Others* [1940] Ch. 323. **Reversed C. A. 864**

*Mette* v. *Mette* - (1859) 1 Sw. & Tr. 416 Followed. *In re* Paine. *In re* Williams. Griffith *v.* Waterhouse - - - **Bennett J. 46**

*Nicholson, In re* - [1938] 3 All E. R. 270 Not followed. *In re* Wilson (Deceased). Hartley *v.* Marie Curie Hospital - **Bennett J. 966**

*Nugent* v. *Vetzera* - (1866) L. R. 2 Eq. 704 Restricted. *In re* B——'s Settlement. B—— *v.* B—— **Morton J. 54**

*Parker, In re* - [1910] 1 Ch. 581, 584, 585 Rules stated by Parker J. in, applied. *In re* Coote. Cavers and Evans *v.* Kaye and Others **Morton J. 549**

*Parker* v. *Birks* - - (1854) 1 K. & J. 156 Considered. *Ex parte* Midland Ry. Co. *In re* Estate of Thomas Milward (Deceased) **Farwell J. 698**

*Payne, In re. Poplett* v. *Att.-Gen.* [1939] Ch. 865. Affirmed - - - **C. A. 576**

*Pytram, Ld.* v. *Models (Leicester), Ld.* [1930] 1 Ch. 639. Discussed and distinguished. King Features Syndicate Incorporated *v.* O. and M. Kleeman, Ld. **Simonds J. 523**

*Sadler* v. *Worley* - - [1894] 2 Ch. 170 Considered. *In re* Corporate Equitable Property Society, Ld. Gardam *v.* The Society and Others - - **Bennett J. 654**

*Scarsdale (Lord)* v. *Curzon* (1860) 1 J. & H. 40. Rule stated by Page-Wood V.-C., in, applied. *In re* Coote. Cavers and Evans *v.* Kaye and Others **Morton J. 549**

*Scholey* v. *Peck* - - [1893] 1 Ch. 709
Followed. *In re* CLAYTON. COLLINS *v.* CLAYTON AND READE
**Morton J. 539**

*Scott* v. *Frank F. Scott (London), Ld., and Others* [1940] Ch. 217.
Affirmed on question of rectification.
**C. A. 794**

*Sinclair's Life Policy, In re* [1938] Ch. 799
Distinguished. *In re* GORDON. LLOYDS BANK & PARRATT *v.* LLOYD & GORDON - - **Simonds J. 851**

*Taylor, In re. Midland Bank Executor and Trustee Co., Ld.* v. *Smith* [1940] Ch. 481.
Appeal dismissed by consent.
**C. A. 834**

*Turnbull* v. *Richardson* (1884) 1 Times L. R. 244.
Followed. *In re* CLAYTON. COLLINS *v.* CLAYTON AND READE
**Morton J. 539**

*Udny* v. *Udny* (1869) L. R. 1 H. L. (Sc.) 441
Distinguished. LUCK'S SETTLEMENT TRUSTS, *In re.* LUCK'S WILL TRUSTS, *In re.* WALKER *v.* LUCK
**Farwell J. 323**

*Uvedale* v. *Halfpenny* (1723) 2 P. Wms. 151
Followed. BANKS *v.* RIPLEY
**Morton J. 719**

*Welsh Church Commissioners* v. *Representative Body of Church in Wales* [1940] Ch. 301.
Reversed - - - **C. A. 607**

*Wickhambrook Parochial Church Council* v. *Croxford* [1935] 2 K. B. 417.
Considered. COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES *v.* REPRESENTATIVE BODY OF CHURCH IN WALES AND TITHE REDEMPTION COMMISSION
**Morton J. 301**

*Wills, In re. Dulverton* v. *Macleod* [1939] Ch. 705.
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*Wilson* v. *London Midland & Scottish Ry. Co.* [1940] Ch. 169.
Affirmed - - - **C. A. 393**

*Winterstoke's Will Trusts, In re* [1938] Ch. 158.
Considered. *In re* HENDERSON. PUBLIC TRUSTEE *v.* REDDIE AND OTHERS - - **Morton J. 368**

*Wolverhampton Corporation* v. *Emmons* [1901] 1 K. B. 515.
Statement of Romer L.J., at p. 524 expanded. CARPENTERS ESTATES, LD. *v.* DAVIES - **Farwell J. 160**

*Wright's Trusts, In re* (1856) 2 K. & J. 595
Distinguished. LUCK'S SETTLEMENT TRUSTS, *In re.* LUCK'S WILL TRUSTS, *In re.* WALKER *v.* LUCK
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*Zouch d. Abbott & Hallet* v. *Parsons* (1765) 3 Burr. 1794, 1801.
Judgment of Lord Mansfield C.J. considered and applied. *In re* PARSONS. BARNSDALE & SMALLMAN *v.* PARSONS - - **Bennett J. 973**

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### 1874.

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**STATUTES**—*continued.*

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### 1892.

55 & 56 Vict. c. 57 (*Private Street Works*), s. 19. URBAN HOUSING CO., LD. *v.* OXFORD CITY COUNCIL - **C. A. 70**

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**STATUTES**—*continued.*

**1908.**

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**1911.**

1 & 2 Geo. 5, c. 46 (*Copyright*), ss. 1, 22. King Features Syndicate Incorporated *v.* O. and M. Kleeman, Ld. - **Simonds J. 523 and C. A. 806**

**1913.**

3 & 4 Geo. 5, c. 31 (*Industrial and Provident Societies* (*Amendment*)), s. 5. *In re* Barnes. Ashenden *v.* Heath **Farwell J. 267**

**1914.**

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4 & 5 Geo. 5, c. 91 (*Welsh Church*), ss. 3, 4, 8, sub-s. 1 (*c*); s. 28, sub-s. 1. Commissioners of Church Temporalities in Wales *v.* Representative Body of Church in Wales and Tithe Redemption Commission - **Morton J. 301 and C. A. 607**

**1915.**

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**1918.**

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**1925.**

15 Geo. 5, c. 18 (*Settled Land*), s. 75, sub-s. 5. *In re* Cutcliffe's Will Trusts. Brewer *v.* Cutcliffe **Morton J. 565**

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15 Geo. 5, c. 19 (*Trustee*), s. 32, sub-s. 1 (*c*). Beckett's Settlement, *In re*. Beckett (Deceased). Eden *v.* Von Stutterheim, *In re* **Simonds J. 279**

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15 Geo. 5, c. 20 (*Law of Property*), s. 35; Sch. I., Part IV., para. 1 (4.). *In re* Milking Pail Farm Trusts. Tucker *v.* Robinson **Farwell J. 996**

—— —— s. 84. *In re* Henderson's Conveyance - **Farwell J. 835**

—— —— s. 103. *In re* Application by Royal Bank of Scotland **Bennett J. 857**

15 Geo. 5, c. 23 (*Administration of Estates*), s. 34, sub-ss. 1, 2. *In re* Wester Wemyss. Tilley *v.* Wester Wemyss - **Crossman J. and C. A. 1**

—— —— s. 34; Sch. I., Part 2. Gordon (deceased), *In re*. Watts *v.* Rationalist Press Association, Ld. - - - **Bennett J. 769**

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15 & 16 Geo. 5, c. 49 (*Supreme Court of Judicature* (*Consolidation*)), s. 50. *In re* Wester Wemyss. Tilley *v.* Wester Wemyss **Crossman J. and C. A. 1**

**1926.**

16 & 17 Geo. 5, c. 51 (*Electricity* (*Supply*)), s. 42. Att.-Gen. *v.* Wimbledon Corporation - **Simonds J. 180**

16 & 17 Geo. 5, c. 60 (*Legitimacy*), ss. 1, 3. *In re* Wicks' Marriage Settlement. Public Trustee *v.* Wicks **Farwell J. 475**

**1927.**

17 & 18 Geo. 5, c. 22 (*Trade Disputes and Trade Unions*), s. 6. Moscrop *v.* London Passenger Transport Board - - **Morton J. 755**

**1929.**

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**1930.**

20 & 21 Geo. 5, c. 44 (*Land Drainage*), s. 9, sub-s. 1. *In re* FITZHERBERT-BROCKHOLES AGREEMENT. RIVER WYRE CATCHMENT BOARD *v.* MILLER **Bennett J. 51**

**1932.**

22 & 23 Geo. 5, c. 37 (*Solicitors*), s. 69. *In re* CLAYTON. COLLINS *v.* CLAYTON AND READE - - **Morton J. 539**

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22 & 23 Geo. 5, c. 48 (*Town and Country Planning*), s. 6, sub-s. 1. CLEADON TRUST, LD. *v.* DAVIS - **C. A. 940**

**1936.**

26 Geo. 5 & 1 Edw. 8, c. 43 (*Tithe*), s. 1; s. 4, sub-s. 2 (*a*); s. 31, sub-ss. 1, 2; Sch. 7. COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES *v.* REPRESENTATIVE BODY OF CHURCH IN WALES AND TITHE REDEMPTION COMMISSION - - **Morton J. 301**

26 Geo. 5 & 1 Edw. 8, c. 49 (*Public Health*), s. 25, sub-s. 3. URBAN HOUSING CO., LD. *v.* OXFORD CITY COUNCIL **C. A. 70**

26 Geo. 5 & 1 Edw. 8, c. 51 (*Housing*) s. 26. BOND *v.* NOTTINGHAM CORPORATION - - - **C. A. 429**

**1938.**

1 & 2 Geo. 6, c. 22 (*Trade Marks*), ss. 4, 68, sub-s. 1. BISMAG, LD. *v.* AMBLINS (CHEMISTS), LD. **Simonds J. 225 and C. A. 667**

1 & 2 Geo. 6, c. 45 (*Inheritance (Family Provision)*), s. 1, sub-s. 7. *In re* VRINT. VRINT *v.* SWAIN **Bennett J. 920**

**STATUTES**—*continued.*

1 & 2 Geo. 6, c. 45 (*Inheritance (Family Provision)*), s. 1, sub-ss. 1, 3, 4; s. 4. *In re* LIDINGTON. LIDINGTON *v.* THOMAS - - - **Farwell J. 927**

1 & 2 Geo. 6, c. 52 (*Coal*), s. 5, sub-s. 2 (*a*). MITFORD CO., LD. *v.* COAL COMMISSION - - - **Farwell J. 706**

**1939.**

2 & 3 Geo. 5, c. 67 (*Courts (Emergency Powers)*), s. 1, sub-s. 1. BROADSTAIRS PICTURE HOUSE, LD. *v.* LITTMAN - - **Bennett J. 860**

*In re* A DEBTOR. *Ex parte* DUNN TRUST, LD. **Farwell and Morton JJ. 65**

—— —— s. 1, sub-s. 2. *In re* BROWN (S.) & CO. (GENERAL WAREHOUSEMEN), LD. - **Bennett J. 961**

SOHO SQUARE SYNDICATE, LD. *v.* E. POLLARD & CO. - **Farwell J. 638**

—— —— s. 1, sub-s. 2 (*a*); sub-s. 4. *In re* ABBEY ROAD BUILDING SOCIETY (POMEROY'S TRUSTEE) **Morton J. 239**

—— —— s. 1, sub-s. 2 (*b*). *In re* CORPORATE EQUITABLE PROPERTY SOCIETY, LD. GARDAM *v.* THE SOCIETY AND OTHERS - - **Bennett J. 654**

MOORGATE ESTATES, LD. *v.* TROWER **Farwell J. 206**

GASSON & HALLAGAN, LD. *v.* JELL **Farwell J. 248**

—— —— s. 1, sub-s. 4. *In re* APPLICATION BY ROYAL BANK OF SCOTLAND **Bennett J. 857**

—— —— s. 1, sub-s. 5. *In re* A DEBTOR [No. 13 of 1939] **Farwell and Morton JJ. 157**

# CASES

DETERMINED BY THE

# CHANCERY DIVISION

AND IN

# LUNACY

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

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## *In re* WESTER WEMYSS.

## TILLEY *v.* WESTER WEMYSS.

[1934. W. 1415.]

1939
*Jan.* 25, 26;
*Feb.* 2.

C. A.
*May* 24;
*June* 6;
*July* 18.

*Administration—Insolvent estate—Creditor's administration action—Claim of executrix against the estate—Estate insufficient to meet her claim—Her right of retainer—Further consideration—Creditor's costs of the action—Judicature Act,* 1890 (53 *&* 54 *Vict. c.* 44), *s.* 5*—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-ss.* 1, 2*—Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 50*—Order* LV., *r.* 15A*—Order* LXV., *r.* 2.

On May 9, 1934, a creditor of the testator commenced proceedings by originating summons for the administration of the testator's estate, which was insolvent. In answer to the inquiry as to debts a joint affidavit by the executrix and her solicitors was filed on October 16, 1934, among the claims being two by the Commissioners of Inland Revenue and one by the executrix. On January 3, 1936, the executrix filed a further affidavit in which she claimed to retain the whole of the testator's estate, subject to any claims having priority, in or towards reduction of her alleged debt.

On July 30, 1938, the Master made his certificate, which showed that the estate was insufficient to meet the claims of the Commissioners of Inland Revenue and the claim of the executrix. The certificate further stated that the executrix claimed to exercise her right of retainer in respect of the sum due to her, but, the plaintiff not admitting such right, the question whether

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WESTER WEMYSS, *In re.*
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the executrix had established such right was reserved for the decision of the Court on the further consideration of the action :—

*Held*, by Sir Wilfrid Greene M.R., and Finlay L.J., affirming the decision of Crossman J. (Luxmoore L.J. dissenting), that the discretionary power of the Court as to costs ought not to be so construed as to enable the Court to override the definite and well established legal right of retainer of an executor, which takes priority over all debts of equal degree, and over the plaintiff's right to be paid his costs of the action.

Per Luxmoore L.J. The Court has a discretion as to costs, in that, as the creditor had no knowledge when he commenced proceedings that the executrix had a claim against the estate and was not informed until January 3, 1936, that she claimed her right of retainer, the Court ought to exercise its discretion in his favour, and his costs of the action down to and including the hearing of the further consideration should be paid out of the funds in Court.

FURTHER CONSIDERATION.

This was the further consideration of a creditor's claim for the administration of the testator's estate, which was insolvent. The testator by his will, made in January, 1904, appointed his wife, the defendant, his executrix. He died on May 24, 1933. On May 9, 1934, the plaintiff, who was a creditor of the testator for 1000*l.*, commenced proceedings by originating summons, and on May 31, the usual order for the administration of the testator's estate was made. In answer to the inquiry as to debts, a joint affidavit by the executrix and her solicitors was filed on October 16, 1934, among the claims being two by the Commissioners of Inland Revenue and one by the executrix for the sum of 2049*l.* 15*s.* 8*d.* On March 25, 1935, the executrix filed an affidavit in which she claimed to be a creditor for a sum of 6049*l.* 15*s.* 8*d.* On January 3, 1936, she filed a further affidavit in which for the first time she claimed to retain the whole of the assets of the testator's estate, subject to any claims having priority, in or towards reduction of her alleged debt.

The Master made his certificate on July 30, 1938. By it he certified that there were two sums entitled to priority amounting to 793*l.* 3*s.* 8*d.*, part of the claim of the Commissioners of Inland Revenue, the sum of 2049*l.* 15*s.* 8*d.*, part of the amount claimed by the defendant, and he allowed 100*l.* for the funeral expenses of the testator. There were not sufficient assets in hand to meet these claims. The certificate further stated that the defendant claimed to exercise her right of retainer in respect of the 2049*l.* 15*s.* 8*d.*, but, the plaintiff not admitting such right, the question whether the defendant had established such right was reserved for the decision of the Court on the further consideration of the action.

*G. E. Timins* for the plaintiff.
*R. O. Wilberforce* for the defendant.

*Cur. adv. vult.*

1939. Feb. 2. CROSSMAN J. [His lordship stated the facts and continued :]

Mr. Timins for the plaintiff, in performance of his duty to protect the creditors generally, has contended that the defendant had no right to retain her debt ; he admitted that the defendant had originally this right, but contended that she had waived it. I have already decided that the defendant has not lost her right of retainer which prevails against the rights of all the creditors except His Majesty's Commissioners of Inland Revenue in respect of a sum of 793*l.* 3*s.* 8*d.*, part of a sum due to them.

As the available assets after the payment of the sum of 793*l.* 3*s.* 8*d.* to His Majesty's Commissioners of Inland Revenue will not be sufficient to discharge the debt of 2049*l.* 15*s.* 8*d.* due to the defendant, the question arises whether the defendant's right of retainer prevails against the plaintiff's right to be paid his costs of the action. The defendant contends that it does, but she offered to pay the plaintiff's costs as between solicitor and client down to January 3, 1936, the date of the filing of the defendant's affidavit in which she claimed her right of retainer. The plaintiff refused to accept this offer, and he contends that the question is a matter in the discretion of the Court and that he ought to be given his costs of the action before the defendant is paid her debt.

Mr. Wilberforce, for the defendant, contends that the question is covered by authority. He relied on the case of *Chissum* v.

*Dewes* (1), and *Tipping* v. *Power* (2), and also the case of *Richmond* v. *White* in the Court of Appeal. (3) In *Chissum* v. *Dewes* (1), which was decided in the year 1828, Sir John Leech M.R. held that the plaintiff in a creditor's administration action was not entitled to have his costs satisfied out of a fund to which the personal representative's right of retainer extended. It is true that in that case the report states that afterwards the administrator consented that the plaintiff should have his costs out of the fund in Court. In *Tipping* v. *Power* (2), which was decided in the year 1842, Wigram V.-C. said this: "When the Court has determined "that there is no creditor of a higher degree than the executor "he must be remitted to his original position, to which the "right of retainer was incident; and he is entitled to retain his "debt in preference to the costs of administering the fund, for "to that extent he is in the same situation as a creditor whose "debt was paid before the suit, and who cannot therefore be "afterwards affected by the costs of administration. *Chissum* "v. *Dewes* (1) decided this very point, and I shall follow that "authority." In *Richmond* v. *White* (4), Hall V.-C., on the further consideration of an administration action, refused to allow the claim of the executor, who was a creditor, to retain his own debt out of a fund paid into Court by an insurance company, in priority to the costs of the action and the debts of the other creditors. On appeal (3), the Court of Appeal (James, Brett and Cotton L.JJ.) reversed the decision of the Vice-Chancellor and held that the executor was entitled to a right of retainer out of the fund. Unfortunately nothing was said in the judgment of the Court of Appeal as to the costs of the action, but in the absence of any reference to the costs in the argument, I think that it must be assumed that the Court of Appeal allowed the claim of the executor as stated in the report. The text books seem to have followed these authorities. In Williams on Executors (1930), 12th ed., at p. 657, the following passage occurs: "Where a "fund in Court is insufficient to discharge the debts of

(1) (1828) 5 Russ. 29.
(2) (1842) 1 Hare, 405, 411.
(3) (1879) 12 Ch. D. 361.
(4) (1878) 10 Ch. D. 727.

"the personal representative, his right of retainer prevails "against the plaintiff's right to have the costs of the action "satisfied," and the three cases to which I have referred are there mentioned. In Daniels' Chancery Practice (1914), 8th ed., at p. 1068, this is stated: "The right of a creditor who institutes "an administration action to be paid his costs out of the fund in "Court does not affect the personal representative's right of "retainer for satisfaction of a debt due to himself; and even "where part of the personal estate had been paid into Court by "an administrator, and another part of it remained in his "hands, but there was a debt due to him from the intestate "greater than the amount of both funds, and no other assets to "satisfy the general body of creditors, or even to pay the "costs of the plaintiff, the Court was of opinion that the "administrator's right of retainer was not affected by the "circumstance of his having paid the money into Court, and "that the plaintiff was not entitled to have his costs satisfied "out of a fund to which the right of retainer extended." In the last edition (the 2nd) of Halsbury's Laws of England, vol. xiv., p. 334, para. 618, the matter is treated in the same way, and the following statement occurs: "The right," that is the right of retainer, "has priority over the costs "of an action to administer the fund," and *Chissum* v. *Dewes* (1) and *Tipping* v. *Power* (2) are referred to as the authority for that.

Mr. Timins for the plaintiff argued before me that the decisions in *Chissum* v. *Dewes* (1) and *Tipping* v. *Power* (2) so far as they affected the plaintiff's costs of an administration action, were overridden by s. 5 of the Judicature Act, 1890, which has now been re-enacted by s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, which gives statutory effect to Order LXV., r. 1, of the Rules of the Supreme Court, and provides that: "Subject to the provisions of this Act and "to rules of court and to the express provisions of any other "Act, the costs of and incidental to all proceedings in the "Supreme Court, including the administration of estates and "trusts, shall be in the discretion of the court or judge, and the

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(1) 5 Russ. 29. (2) 1 Hare, 405.

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"court or judge shall have full power to determine by whom "and to what extent the costs are to be paid."

In my judgment this section does not affect the cases of *Chissum* v. *Dewes* (1) and *Tipping* v. *Power* (2) so far as they dealt with the personal representative's right of retainer. As stated in Daniels' Chancery Practice, 8th ed., vol. ii., chap. xviii., at p. 1021, under the practice of the Court of Chancery the giving of costs was entirely discretionary, although in the exercise of that discretion, the Court was governed by certain definite principles, and this was the case when *Chissum* v. *Dewes* (1) and *Tipping* v. *Power* (2) were decided.

In my judgment the ground of those decisions is contained in the passage which I have quoted from Wigram V.-C.'s judgment in the second case. I do not think that the case of *In re Roby* (3) affects the question, as the decisions on which I am relying do not involve the making of any order depriving the plaintiff of his costs, although the result of the decisions may be that there is in fact no fund out of which the plaintiff's costs can be satisfied.

I do not think that s. 34 of the Administration of Estates Act, 1925, affects the question, and I refer to the observations of Lord Tomlin in *Attorney-General* v. *Jackson* (4) dealing with that section.

I hold, therefore, on the whole that the defendant is entitled to retain her debt in priority to the plaintiff's costs of the action.

A. R. LL.-T.

The plaintiff appealed against the order as to costs. The appeal was heard on May 24 and June 6, 1939.

*Lionel Cohen K.C.* and *G. E. Timins* for the appellant. The executrix is not entitled to exercise her right of retainer so as to receive payment of the debt due to her from the testator preferentially to the costs incurred by the plaintiff in bringing the creditor's administration action. The plaintiff represented all creditors (including preferential creditors) in bringing the action and the costs of the action rank prior to

(1) 5 Russ. 29.
(2) 1 Hare, 405.
(3) [1916] W. N. 37.
(4) [1932] A. C. 365, 383, 384, 385.

all debts, as the action enures for the benefit of all creditors. Further, the costs were incurred entirely because of the failure of the executrix to disclose her right of retainer at once, for the debt due to her is sufficient to exhaust the estate, and the Court will in those circumstances exercise its discretion to direct all costs of the administration action to be paid in priority. If the action was to be stopped as soon as the executrix asserted her right of retainer, it was for her to apply to stop it.

The two cases dealing with costs are *Chissum* v. *Dewes* (1) and *Tipping* v. *Power*. (2) In the earlier case it was held that the right of retainer was not lost by the fund being in Court and that the plaintiff was not entitled to his costs out of the fund, but the executor in that case allowed the plaintiff his costs, so that there could be no question of an appeal. In the present case there is a preferential creditor having priority to the executrix, and the costs of the action must have the same priority. If here the proceedings had been brought by the Crown in respect of its claim against the estate, which admittedly ranked in priority to the executrix's right to retainer, there must have been the same priority in regard to the costs of the administration action. The plaintiff, bringing an action on behalf of all creditors, can be in no worse position. The costs of the action really rank ahead of all creditors: *Larkins* v. *Paxton* (3); *Attorney-General* v. *Jackson*. (4)

Even though *Chissum* v. *Dewes* (1) and *Tipping* v. *Power* (2) go some way to indicate that where there is no preferential creditor ranking ahead of the executor's right of retainer, the costs of an administration action rank after the executor's right of retainer. That no longer holds good where there is a creditor of higher degree than the executor, for the plaintiff, who represents all creditors, represents the creditor of higher degree. It is his efforts that has obtained the fund for paying the preferential creditor. In any case the Court ought to exercise its discretion in favour of the plaintiff. This discretion is rendered wider by Order LV., r. 10, and the Judicature Act, 1890, s. 5, and a practice has since grown up of giving priority to the costs of an administration action, as is shown by *In re Roby.* (1)

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(1) 5 Russ. 29.
(2) 1 Hare, 405.
(3) (1835) 2 Myl. & K. 320.
(4) [1932] A. C. 365.

*F. R. Evershed K.C.* and *R. O. Wilberforce* for the respondent. What the appellant is really seeking here is to make the respondent pay his costs of the administration action. At the most he can only be entitled to the costs down to the date when the right of retainer was claimed. If a plaintiff pursues an administration action after he is warned that there are no assets owing to the executor's right of retainer, he must bear his own costs: see Daniels' Chancery Practice, 8th ed., vol. ii., p. 1068; Ingpen on Executors and Administrators, 2nd ed., p. 385; *Fuller* v. *Green* (2), and *King* v. *Bryant.* (3)

[LUXMOORE L.J. The Court would not grant a stay till the debts were ascertained.]

It need not go to further consideration. It cannot be right for the Court to go on with elaborate accounts at great expense where there are no assets available.

Again the ordinary rule that the plaintiff in an administration action is entitled to the costs of the action has no application where there is a right of retainer. The retainer is treated as exercised before the action commences and the administration action relates to the assets of the estate that remain. That is the reason for the decision in *Chissum* v. *Dewes* (4) and *Tipping* v. *Power* (5); compare *In re Rhoades* (6) and *Richmond* v. *White* (7), which show that the assets must be treated as passing through the executor's hands when the right of retainer arises. The position is the same here as if the respondent had paid herself before the action started, and it follows that if no estate remains over the plaintiff cannot recover the costs of the action. The only limitation on the effect of the executor's retainer is that any creditor of a higher degree must be paid first. The Administration Act, 1925, s. 34, sub-s. 1, provides, in the case of an insolvent

(1) [1916] W. N. 37.
(2) (1857) 24 Beav. 217.
(3) (1841) 4 Beav. 460.
(4) 5 Russ. 29.
(5) 1 Hare, 405.
(6) [1899] 2 Q. B. 347.
(7) 12 Ch. D. 361.

estate, for the administration of the assets in accordance with the rules in Sch. I., Part I., to the Act, but sub-s. 2 preserves the personal representatives' right of retainer in respect of all assets of the deceased's estate. The right of retainer remains, therefore, unaltered.

[LUXMOORE L.J. Is not the true view that when once a suit for administration has been commenced, the right of retainer is no longer absolute, but will be allowed by the order of the Court, subject to the costs of action ?]

That does not accord with *Chissum's* case. (1) Lindley M.R. in *In re Rhoades* (2) cites Blackstone's Commentaries by Kerr, 4th ed., vol. iii., p. 18; he also referred to *Woodward* v. *Darcy*. (3) The appointment of a creditor as executor extinguishes the debt: Williams on Executors and Administrators, 12th ed., vol. ii., p. 858. In a creditor's suit for administration his costs are to be provided for after those of the executor: *Loomes* v. *Stotherd*. (4) In *In re Hayward* (5) and *Wilson* v. *Wilson* (6) it was held that, on the facts in those particular cases, the legal personal representatives had no right of retainer. There is no common law right of retainer in real estate, but a Court of Chancery, in administering an estate, will allow any creditor who has an interest in the real estate to sue. *Wilson* v. *Coxwell* (7) and *In re Harris* (8) deal with the effect of the Administration of Estates Act (Hinde Palmer's Act), 1869 (32 & 33 Vict. c. 46). The Administration of Estates Act, 1925, does affect the right of retainer.

[LUXMOORE L.J. Sect. 34, sub-s. 2, deals with the right of retainer. Is that subject to sub-s. 1 ?]

No. The first three words of the second paragraph of sub-s. 2 only refer to the first paragraph of that sub-section: see Lord Tomlin in *Attorney-General* v. *Jackson*. (9) The executrix ought certainly to be allowed to retain the money in her hands at her discretion. She has a right of retainer, which takes priority of the appellant's costs.

(1) 5 Russ. 29.
(2) [1899] 2 Q. B. 347, 352, 354.
(3) (1557) 1 Plowd. 184, 186.
(4) (1823) 1 L. J. (O. S.) 220.
(5) [1901] 1 Ch. 221.
(6) [1911] 1 K. B. 327.
(7) (1883) 23 Ch. D. 764.
(8) [1914] 2 Ch. 395.
(9) [1932] A. C. 365, 384.

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*Lionel Cohen K.C.* in reply. If the order of Crossman J. stands as it was made it would not be safe for any creditor to commence administration proceedings, unless the executor gave an assurance that he would not exercise his right of retainer against the creditors' costs: see *In re Roby.* (1)

1939. July 18. SIR WILFRID GREENE M.R. On May 9, 1934, the plaintiff, a creditor of the testator, issued an originating summons asking for administration of his estate (which was admittedly insolvent) and on May 31 an order for administration in the usual form was made. In answer to the inquiry as to debts a joint affidavit by the respondent, the executrix, and her solicitor was filed on October 16, 1934. Among the claims set out in the exhibits to that affidavit there appeared the following: (1.) as "Claims which ought to be proved by "the claimants" two claims by the Commissioners of Inland Revenue, one for a sum of 682*l.* 6*s.* 11*d.* in respect of income tax and the other for a sum of 1029*l.* 5*s.* 3*d.* in respect of sur-tax; (2.) as a claim proper to be allowed without further evidence the plaintiff's claim in respect of a debt of 1000*l.* and interest; (3.) as similar claims the respondent's claim (*a*) to a sum of 2049*l.* 15*s.* 8*d.* the amount of loan and interest repaid by her to Martins Bank, Ld., on behalf of the deceased; (*b*) to the value of certain stocks alleged to have been deposited by the respondent with bankers as security for overdrafts and loans to the deceased; (*c*) to a sum of 1000*l.* alleged to have been paid to the Inland Revenue on behalf of the deceased.

On March 25, 1935, the respondent filed a further affidavit in which she quantified her claims at the figure of 6049*l.* 15*s.* 8*d.* That sum was made up of the two sums of 2049*l.* 15*s.* 8*d.* and 1000*l.* already referred to together with a sum of 3000*l.* to represent the value of the deposited securities which had been sold by the bank.

On January 3, 1936, a further affidavit was filed by the respondent in which for the first time she claimed to retain the whole of the assets of the deceased's estate, subject to

(1) [1916] W. N. 37.

any claims having priority, in or towards reduction of the alleged debt of 6049*l.* 15*s.* 8*d.*

On April 23, 1937, the respondent filed another affidavit dealing with her alleged debt, but there is nothing in it to which reference need be made.

On July 30, 1938, the Master issued his certificate. In the First Schedule, Part I., there appeared as a debt entitled to priority two sums amounting to 793*l.* 3*s.* 8*d.*, part of the claim of the Commissioners of Inland Revenue. The remainder of that claim was not entitled to priority. In Part II. of the First Schedule there appeared among the debts allowed the amount claimed by the appellant and the sum of 2049*l.* 15*s.* 8*d.* part of the amount claimed by the respondent as already mentioned. With regard to this latter sum the certificate stated the respondent's claim to exercise her right of retainer and that " the plaintiff not admitting such right the question "whether the defendant has established such right is reserved "for the decision of the Court " on further consideration. In the Third Part of the First Schedule among the claims disallowed there appeared the respondent's claim in respect of the deposited securities and the sum of 1000*l.* already mentioned.

Paragraph 2 of the certificate stated that of the sum of 408*l.* 2*s.* 5*d.* paid for funeral expenses the sum of 100*l.* only was allowed. Paragraph 3 recorded the payment into Court by the respondent of a balance of 484*l.* 0*s.* 7*d.* remaining in her hands. In addition to this sum of 484*l.* 0*s.* 7*d.* there had been paid into Court by the respondent as recorded in the same paragraph two sums of 733*l.* 4*s.* 4*d.* and 1022*l.* 19*s.* 1*d.* The outstanding property of the testator was set out in the Second Schedule. It consisted of certain shares and a loan which are apparently of no value, a reversionary interest which is stated in the body of the certificate to be at present unascertained and 1716*l.* 4*s.* 8*d.* 3½ per cent. Conversion Stock and 484*l.* 0*s.* 7*d.* cash in Court to the credit of the action.

When the action came before Crossman J. on further consideration two questions arose for argument. First was the question whether or not the respondent was entitled to

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exercise her right of retainer in respect of the sum of 2049*l.* 15*s.* 8*d.*

The argument appears to have been that the respondent must be taken by her conduct to have waived her right of retainer. This argument Crossman J. refused to accept and by the order made on further consideration on February 2, 1939, it was declared that subject to the payment of the claim of the Commissioners of Inland Revenue to the sum of 793*l.* 3*s.* 8*d.*, which was entitled to priority, the respondent was entitled to exercise her right of retainer in respect of the debt of 2049*l.* 15*s.* 8*d.* There is no appeal against this part of the order.

The other question related to the appellant's costs of the action. The appellant claimed that, notwithstanding the respondent's right of retainer, he was entitled to have his costs of the action paid out of the funds in Court in priority to the claim of the respondent. This question Crossman J. decided in favour of the respondent and the order contains a declaration that her right of retainer is exercisable in priority to the payment of the appellant's costs of the action. It is against this part of the order that the present appeal is brought.

The order also directed that the account of the testator's property be continued and the second further consideration of the action was adjourned. The payment schedule to the order provided for the sale of the Conversion Stock and for the payment of 793*l.* 3*s.* 8*d.* to the Commissioners of Inland Revenue and of the residue of the funds in Court to the respondent.

At the hearing before Crossman J. the respondent, by her counsel, offered to allow the appellant his costs down to January 3, 1936 (the date when she first claimed to exercise her right of retainer), in priority to her claim, provided that he abandoned the rest of his claim in respect of costs. This offer was declined. Before us counsel for the respondent stated that by way of concession and not of admission the respondent would not in any event claim priority over the costs down to January 3, 1936.

Crossman J. held that the general rule that the executor's right of retainer takes priority over the right of the plaintiff in an administration action to have his costs paid out of the fund has not been displaced by Order LXV., r. 1, which puts costs (including expressly the costs of administration proceedings) in the discretion of the Court.

The argument before us fell under three heads. First it was said that the rule, if it applied at all upon the facts of the present case, has been displaced by Order LXV., r. 1, in the sense that the Court is entitled to disregard it and to make such order as to costs as in the circumstances it thinks just. Secondly, it was said that the costs of administration are given priority by s. 34, sub-s. 1, of the Administration of Estates Act, 1925. Thirdly, it was said that in any event the rule does not apply to a case where the effect of the administration proceedings has been to establish a claim having priority over the executor's debt, the argument being that the plaintiff having by his action preserved the assets for the benefit of the preferential creditor is entitled to his costs in priority to the claim of that creditor and, therefore, in priority to the executor's right of retainer.

It is convenient to deal first with the third of these contentions. In order to arrive at the true answer to the question which it raises, the nature of the executor's right of retainer must be considered. In the 16th edition of the 3rd book of Blackstone's Commentaries it is stated in chapter 2 at p. 18 that "the executor . . . . having the whole personal estate in "his hands, so much as is sufficient to answer his own demand is, "by operation of law, applied to that particular purpose." If there are no administration proceedings in which the executor is ordered to bring money into Court, no difficulty arises in the application of this rule, subject, of course, to the rights of creditors of higher degree. As against other creditors the rule is absolute. When, however, the executor is ordered to bring the money in his hands into Court, the Court takes the assets provisionally into its charge pending the decision of the question whether or not the right of retainer exists. But in doing so the Court acts entirely without prejudice to the right, if it is ultimately shown to exist, and the executor in that event is put back into the same position as if the money had never been brought into Court at all. This principle is nowhere more clearly expressed than in the judgment of Wigram V.-C. in *Tipping* v. *Power* (1) where he says: "The next point is on the "question of retainer by the executors. They have clearly a "right to retain their debt. The fact of the money having been "brought into Court can make no difference. The debt of the "executors being a simple contract debt, the Court will not "allow them to keep the fund in their possession; but the "Court will nevertheless ultimately place them in the same "position as if they had kept it in their hands. If an executor "says, ' I have paid so much money in satisfaction of debts,' he "is not charged with it, or, if he is charged with it, he is allowed "it in his discharge; but the Court does not give the same "effect to the allegation, ' I have retained so much for my own "' debt.' The rule is to consider the executor as having a right "to retain in a due course of administration; but the Court "says, until the accounts are taken it cannot see that the "right of retainer will exist. When the Court has determined "that there is no creditor of a higher degree than the executor "he must be remitted to his original position, to which the "right of retainer was incident; and he is entitled to retain his "debt in preference to the costs of administering the fund, for to "that extent he is in the same situation as a creditor whose "debt was paid before the suit, and who cannot therefore be "afterwards affected by the costs of administration. *Chissum* "v. *Dewes* (2) decided this very point, and I shall follow that "authority." It was suggested that the penultimate sentence of this paragraph means that where there is a creditor of a higher degree the executor's right of retainer loses its priority over the plaintiff's costs even where the plaintiff is a creditor of the same degree as the executor. I cannot so read it. The reference to the creditor of a higher degree merely means that where such a creditor exists, his claim takes priority; it has nothing to do with the question with which we are here concerned.

The nature of the executor's right of retainer and the basis upon which it rests were discussed at length by this Court in *In re Rhoades* (1), where Lindley M.R., in delivering the judgment of the Court, says: "It is quite plain from these authorities "that the executor's right to retain assets in his hands was, as "against him, treated as enforced as soon as he could properly "enforce it. It would be very strange if it were held that he "had lost his right because he had done nothing to assert it "before there was any occasion to do so. It is only when some "one seeks to take assets out of the executor's possession that "it becomes necessary for him to assert his right of retainer; "and, if he asserts it then, his right must be protected, unless, "of course, he has released it or done something to deprive "himself of it;" and again he says (2): "He has no right to "retain against creditors of a higher degree than himself; "but his right to retain is a right to withdraw from the assets in "his hands and distributable amongst himself and other "creditors of equal degree enough to pay himself in full." I may also refer for a statement of the origin and nature of the right to the speech of Lord Atkin in *Attorney-General* v. *Jackson*. (3)

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(1) 1 Hare, 405, 411.

(2) 5 Russ. 29.

That payment into Court by an executor in administration proceedings is without prejudice to his right of retainer is stated in terms in the judgments delivered in this Court in *Richmond* v. *White*. (4) In that case money had been paid into Court by an insurance company but the executor's right of retainer was held nevertheless to be exercisable. James L.J. (with whom Brett L.J. agreed) said (5): "That must have been "without prejudice to the right of the executor, just as much "as if the form had been gone through of the money being paid "to him and then paid by him into Court." Cotton L.J. said (5): "The Vice-Chancellor says in his judgment, 'The executor "'might have protected himself when the money was paid "'into Court,' that is, as I understand it, the executor might "have had a clause put in the order that the money was paid in "without prejudice to his right of retainer. But I am of opinion

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(1) [1899] 2 Q. B. 347, 353.
(2) Ibid. 354.
(3) [1932] A. C. 365, 370.
(4) 12 Ch. D. 361.
(5) Ibid. 361, 363.

"that the order must be read as if such a reservation had been "contained in it. . . . . The Court never allows an order for "payment of money into Court to prejudice the rights of the "person paying it in."

I may add that I have looked at the original order of this Court in *Richmond* v. *White* (1) and the assumption of Crossman J. with regard to it is shown to have been correct. The order directs the funds in Court to be applied in the first place in payment of the debt owing to the executor and the balance was paid to his solicitor on account of his costs.

I need not discuss the other authorities or the opinions of text book writers, the most important of which are referred to in the judgment of Crossman J. I may summarize what, in my opinion, is the effect of the authorities by saying that assets in respect of which the executor is entitled to exercise and claims to exercise a right of retainer are in effect withdrawn from the pool of assets available for the payment of debts of the same or a lower degree ; that payment into Court in an administration action is without prejudice to the executor's right and does not affect the substance of the situation, that payment being mere machinery for preserving the assets pending a decision upon the executor's claim ; and that the inevitable result is to preserve the priority of that claim, if established, over the plaintiff's costs of action since the result of the establishment of the claim is to put the executor back into the same position with regard to the assets in question as he would have been in if he had been allowed to exercise his right of retainer at the outset.

If this view is correct I am unable to see how the fact that there is a debt of higher degree can affect the position. If there had been no administration proceedings the respondent's right of retainer would have extended to the whole of the funds in her hands after satisfying the claim of the Crown ; neither the appellant nor any other creditor of equal degree would have had any right to those funds. Before payment into Court the funds in the respondent's hands belonged to her subject to the right of the Crown and payment into Court was made without prejudice to her right. I am unable to see why the existence of

(1) 12 Ch. D. 361.

the Crown's claim can have put the appellant into a better position as against the executrix than he would have been in if that claim had not existed. The only practical result of the proceedings has been to determine the extent of the Crown's priority as against the executrix, a matter with which the appellant and the other creditors of equal degree have no concern whatever. The result of the plaintiff's contention, if accepted, would be to throw his costs upon the executrix, which is the very thing that a plaintiff in an administration suit is not entitled to do where the executor has a right of retainer. It is, in my opinion, fallacious to say that the plaintiff stands for this purpose in the shoes of the Crown and that he is entitled to his costs upon the footing that by instituting the proceedings he preserved the assets for the Crown. There were ample funds to meet the Crown's claim and there is no reason whatever to suppose that it would not have been duly met.

I now come to the first of the two arguments summarized above. I agree with the view of the learned judge that the discretion conferred upon the Court in the matter of costs does not affect the well settled principles which govern the right of retainer. To use the words of James L.J. in *Richmond* v. *White* (1), the right of retainer "is a well established right of "the executor which the Court has to apply to the facts of this "case without allowing any technicality to defeat it." There is no suggestion to be found in any of the authorities or the text books that the right is affected by s. 5 of the Judicature Act, 1890 (now s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925), and on principle I do not think that a discretionary power as to costs ought to be construed so as to enable the Court to override a definite and well established legal right such as that of retainer. Of course, the conduct of the executor may be such as to amount to a waiver of the right or to preclude him from asserting it, either absolutely or to the extent of the plaintiff's costs or some part of them. But any priority so obtained by the plaintiff would not be due to an exercise of the Court's discretion; it would be due to the extinction of the right of retainer, in whole or pro tanto. If,

(1) 12 Ch. D. 361, 363.

contrary to this view, the Court is entitled in a proper case to override the right of the executor, I see nothing in the facts of this case to justify it in doing so.

Upon this branch of the argument reliance was placed upon two matters. First it was said that in proceeding with the action the plaintiff was carrying out the directions of the Court, and that he was accordingly constrained to carry it as far as further consideration. But even if it be assumed that there was any such compulsion on the plaintiff (a view which I cannot accept), this argument proves too much, for it would apply to every creditor's administration action. The result would be that the plaintiff's costs of such an action would always have priority over the executor's right of retainer, unless indeed it were to be expressly stated in the decree that the proceedings were to be without prejudice to that right. There is, in my opinion, no warrant in principle or in authority for giving any such effect to an administration decree and the subsequent proceedings under it. The other matter relied upon was an affidavit sworn by Mr. Woolcott, a managing clerk in the employment of the solicitors to the plaintiff. In this affidavit, which was first produced in this Court and was read by leave, an attempt is made to show that by reason of certain statements made by the solicitors to the respondent at an early stage before proceedings were commenced she ought not to be allowed to claim priority. But this evidence appears to me to be nothing more than additional evidence directed to the suggestion (which Crossman J. rejected) that the respondent by her conduct had in some way waived her right to claim priority. If effect were given to the argument it would mean that the respondent had surrendered her priority pro tanto. I do not think that it is open to the appellant, having failed on the question of waiver, to put forward the same class of facts as a ground upon which the Court should exercise a discretion in his favour, the result of which would be to deprive the respondent pro tanto of her right of retainer. In any event the facts relied on are not, in my opinion, such as to justify the Court, if it has a discretion, in exercising it so as to deprive the respondent of her priority.

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The argument based on s. 34 of the Administration of Estates Act, 1925, can be dealt with quite shortly. Sub-s. 1 of that section incorporating Part I. of the First Schedule gives priority to the funeral, testamentary and administration expenses where the estate is insolvent. But sub-s. 2, after making certain provisions as to the right of retainer, continues: "Subject as aforesaid, nothing in this Act affects the "right of retainer of a personal representative, or his right "to prefer creditors." In this paragraph the words "subject as "aforesaid," in my opinion, quite clearly refer only to the earlier part of sub-s. 2 and do not refer to sub-s. 1, with the result that the directions given by that sub-section as to the priority of administration expenses do not affect the right of retainer: see speech of Lord Tomlin in *Attorney-General* v. *Jackson.* (1)

In the result the appeal is dismissed with costs, but in view of the respondent's offer, referred to earlier in this judgment, there will be inserted after the declaration of the prior right of the respondent a paragraph to the effect that she consents to the payment of the appellant's costs as between solicitor and client down to January 3, 1936, being paid out of the fund in priority to her claim and a direction for taxation of those costs. The appellant must pay the costs of the appeal with the usual set-off. The necessary consequential alteration in the Payment Schedule must be made.

I am authorized by Finlay L.J. to say that he has read and agrees with the judgment which I have just delivered.

Luxmoore L.J. This appeal is from an order made by Crossman J. on February 2, 1939, on the further consideration of an action for the administration of the estate of the late Lord Wester Wemyss.

The main question raised was, whether the plaintiff was entitled to his costs of the action down to and including the order made on further consideration, notwithstanding the right of the defendant executrix to retain a debt found to be due to her by the Master's certificate in the action. The existence of the right of retainer was challenged unsuccessfully

(1) [1932] A. C. 365, 384.

before Crossman J., and there is no appeal from that part of his decision. Crossman J. held that the plaintiff was not entitled to have his costs of the action in priority to the defendant's right of retainer, with the result that as the assets at present available are insufficient to satisfy the debt found due to the defendant, the plaintiff is deprived, at any rate for the time being, of his costs of the action.

Luxmoore L.J.

The plaintiff has appealed from this part of the order and asks that it may be varied by providing that his costs of the action down to and including the order on further consideration may be directed to be paid out of the funds standing to the credit of the action, notwithstanding the defendant's right of retainer in respect of her debt, and after payment of the debt of 793*l.* 3*s.* 8*d.* due to the Commissioners of Inland Revenue which admittedly has priority to the right of retainer.

The appellant put his case in this Court on three different grounds. His first ground was, that the costs of an administration action, unless all questions with regard thereto are reserved by the order for administration, are a first charge on the estate which is being administered and consequently take priority over any right of retainer exercisable by the legal personal representative. If this contention should be rejected he claimed that upon the true construction of s. 34 of the Administration of Estates Act, 1925, statutory priority is, in the case of insolvent estates, given to the costs of administration and, thirdly, he claimed that under the provisions of Order LXV., r. 1, the Court has the widest discretion with regard to the costs of any action including an action for the administration of the estate of a deceased person and that, even if the right of retainer has priority over the costs of administration, the circumstances of the present case are such that the Court ought, in the exercise of its discretion, to order the payment of the plaintiff's cost of action down to and including the order on further consideration out of the funds in Court, notwithstanding the existence of the defendant's right of retainer. In support of this last contention further evidence was deduced before this Court to explain the material circumstances in which the action was instituted and the order for administration made. The further evidence consisted of an affidavit made by one Reginald Harry Woolcott, the managing clerk to the solicitors acting for the plaintiff, together with an exhibit marked " R. H. W." containing the original notes made by him at an interview he had with a representative of the defendant's solicitors on April 26, 1934. Reference was also made to the correspondence passing between the solicitors of the plaintiff and defendant with regard to this action. It appears from the said affidavit exhibit and correspondence that the plaintiff, who was a creditor of the estate of the testator for a sum in excess of 1000*l.*, being desirous of enforcing his claim, consulted his solicitors, who by Mr. Woolcott, to whom I have already referred, interviewed a representative of the solicitors acting for the defendant. At that interview Mr. Woolcott was told that the defendant as executrix had obtained probate of the testator's will, that the estate was insolvent, the assets being sworn at 2915*l.* 19*s.* 7*d.* while the liabilities amounted to 13,734*l.* 14*s.* 3*d.*, that such liabilities included the debt due to the plaintiff and that the funeral expenses amounted to 371*l.* 16*s.* 10*d.* Mr. Woolcott was also told that no creditor would take administration proceedings and was given particulars of the principal creditors, among whom were the Commissioners for Inland Revenue and certain banks. It was not suggested that the defendant executrix was a creditor of the estate or had any claims against it. The affidavit for probate contains no mention of any claim against the estate by the defendant. This affidavit was produced to Mr. Woolcott in support of the statements made to him. Mr. Woolcott was also told that if the plaintiff instituted administration proceedings no opposition would be made by the defendant and that every assistance would be given by her to get in the estate. In these circumstances the summons for administration was issued on May 9, 1934. In so doing the plaintiff was, in my judgment, entitled to rely upon the statements made to him on behalf of the defendant and to act on the assumption that no question of executor's retainer could thereafter arise, for such an assumption was the natural consequence of the information given by the defendant's solicitors. The solicitors for the respective parties appeared before the Master on May 31, 1934, and on the defendant's admission that the estate was insolvent the Master made an order for general administration, as he was entitled to do, in accordance with the provisions of Order LV., r. 15a. A joint affidavit by the defendant and her solicitor was filed on October 16, 1934, setting out the testator's debts, which included particulars of the debt due to the plaintiff, the debts due to the Commissioners for Inland Revenue and the debts alleged to be due to the defendant. This affidavit for the first time mentioned the defendant's claims against the estate. A further affidavit was filed by the defendant on March 25, 1935, in which she stated that her claims as a creditor against the testator's estate amounted to 6049*l.* 15*s.* 2*d.* On January 3, 1936, a further affidavit was made by the defendant in which she set up her claim to retain the whole of the testator's assets in or towards reduction of the 6049*l.* 15*s.* 2*d.*, subject only to any claim having priority thereto.

Before the last mentioned affidavit was sworn the plaintiff's solicitors wrote to the defendant's solicitors on June 27, 1935 (sending to them a copy of a case for the opinion of counsel and the opinion of counsel thereon), stating in effect that, in view of the defendant's claims and the value of the assets, the plaintiff did not propose to take any further steps in the action. The Master, however, insisted on the action proceeding so that his certificate could be made and filed. This was done. The Master made his certificate on July 30, 1938. By it, he certified that the debts of the testator which had been allowed amounted to 12,309*l.* 18*s.* 8*d.* These included three sums of 793*l.* 3*s.* 8*d.*, 520*l.* 0*s.* 5*d.* and 412*l.* 4*s.* 7*d.* respectively due to the Commissioners for Inland Revenue, a sum of 1083*l.* 4*s.* 4*d.* due to the plaintiff and a sum of 2049*l.* 15*s.* 8*d.* due to the defendant. The certificate found that the sum of 793*l.* 3*s.* 8*d.* due to the Commissioners for Inland Revenue was entitled to priority over all other debts, and stated that the defendant claimed to exercise her right of retainer in respect of the 2049*l.* 15*s.* 8*d.*, but, the plaintiff not admitting such right, the question whether the defendant had established such right was reserved for decision of the Court on the further consideration of the action.

When the action came before Crossman J. on further consideration the question whether the defendant was entitled to exercise her right of retainer was challenged but, as I have already stated, the learned judge declined to accept the plaintiff's contention that the right could not be exercised, and declared by the order on further consideration that, subject to the payment to the Commissioners of Inland Revenue of the sum of 793*l*. 3*s*. 8*d*., the defendant was entitled to exercise her right of retainer in respect of the sum of 2049*l*. 15*s*. 8*d*. The only matter in question on the appeal is whether the plaintiff is entitled to his costs of the action out of the estate. The defendant, while not admitting the plaintiff's right to be paid any part of his costs of the action in this Court, stated that as a matter of grace the defendant would in any event pay such costs down to and including January 3, 1936, the date on which the defendant claimed for the first time to exercise her right of retainer.

As I have already stated there are three questions to be determined on this appeal. The first and second questions have been fully dealt with in the judgment which has been delivered by the Master of the Rolls. I have had the advantage of reading that judgment and, so far as those two questions are concerned, I find myself in complete agreement with the conclusion at which he has arrived, namely, that the right of retainer has priority over the costs of an administration action, and I respectfully agree with his reasons for that conclusion. I, therefore, think it unnecessary for me to deal further with those questions.

The other question, however, remains. I have come to the conclusion that the Court ought, in the exercise of its discretion and notwithstanding the existence of the right of retainer, to order that the plaintiff's costs of the action down to and including the order on further consideration, with an exception to which I will refer later, be paid out of the funds in Court. The reasons why I have come to this conclusion are as follows. The plaintiff did not start the proceedings for administration without making proper inquiries. As the result of the conversation between the respective solicitors the plaintiff was entitled to act on the assumption that the representations made on the defendant's behalf as to claims against the estate were correct, and that no question of the executor's right of retainer would arise, because there was a representation that the executrix had no claim against the estate. The representations, although made in good faith, were inaccurate, but I see no reason why the plaintiff was not entitled to rely upon them or the defendant to be bound by them. It is to be observed that to allow the plaintiff so to do does not deprive the defendant of her right of retainer; that right still remains. In my judgment, having regard to the nature of the representations made, it would be inequitable not to direct payment of the plaintiff's cost of the action out of the funds in Court. So far as the exercise of the Court's discretion as to costs is concerned, I think the plaintiff is in the same position as if the defendant had requested him to start the proceedings for administration and to obtain an order therefor with her concurrence on the footing that the defendant had no claim against the estate, for the plaintiff instituted his action for administration with the full knowledge and co-operation of the defendant, and the order for administration was made upon the defendant's admission that the estate was insolvent and in the presence of her solicitors. After the order was made the administration of the estate passed out of the defendant's hands and was assumed by the Court, for the order for administration directed that the testator's property should be applied in payment of his debts and funeral expenses in due course of administration. After this order neither the plaintiff nor the defendant could stop the proceedings, nor could the defendant, in the absence of a certificate in answer to the inquiry as to debts, have applied to the Court with any hope of success for payment out of the assets to her on the basis of her right of retainer.

The position of the Court with regard to staying further proceedings in an administration action after a general order has been made containing a direction that the assets are to be applied in payment of a testator's debts in due course of administration is stated in *In re Alpha Co., Ld.* (1) That action was what is known as a debenture holders' action, and not an action for administration of the estate of a deceased person. In it the rule with regard to the discontinuance of an administration action was stated and held not to apply to a debenture holders' action. Kekewich J. said (2): "The "plaintiff wishes to discontinue his action, and the question "is whether he is entitled to do that after judgment, . . . . "The action has been likened to an administration action by "a creditor, suing on behalf of himself and all other creditors, "against an executor or administrator for administration. "I do not pause to distinguish between an action by a "specialty creditor, or any other particular class of creditor, "but I take the simple case. The creditor who is plaintiff "obtains a judgment. The moment he has done that, "if it is a proper judgment, he cannot possibly stop, . . . . "for this reason, namely, that if it is a proper judgment it "not only directs inquiries as to debts, etc., but also that the "assets shall be applied 'in a due course of administration.' "It is perfectly well settled that if there is not that direction "as to the administration of assets the decree is not an administration decree in the proper sense of the term, and actions "at law cannot be restrained. But if that direction is given, "they can be restrained, and for the reason that the Court "has then taken upon itself the duty of administering the "assets. . . . . until there is a certificate that all the other "debts have been paid, the plaintiff after decree is not "dominus litis; he is, so to speak, a trustee of the action "for the benefit of the other creditors." The position in the present case is that the plaintiff was not able to stop the proceedings. He had, with the assent of the defendant, obtained an order for administration of the testator's estate in the proper form and the Court having, by reason of such order, undertaken the duty of administering the estate, could properly refuse to make any order for payment out of the assets until after the Master's certificate in answer to the inquiry as to debts had been made. The defendant was not

(1) [1903] 1 Ch. 203.

(2) Ibid. 205–6.

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in a position to ask the Court to allow her to exercise her right of retainer, at any rate, until the debts, having priority to her claim, had been ascertained and certified. In substance, so far as the defendant is concerned, she has taken advantage of the work done by the plaintiff in this action to obtain the benefit of her right of retainer. The question whether the Court should exercise its discretion as to costs in favour of the plaintiff is, I think, different from the question whether there has been any waiver of the right of retainer, and the answer to it depends upon considerations different to those to be considered on the latter question.

I am of opinion that the Court ought, in order to do what is right between the parties, to exercise its discretion as to costs by ordering that the plaintiff's costs of the action down to and including the order on further consideration should be paid out of the funds in Court, but with this exception; the plaintiff has challenged the existence of the defendant's right of retainer and has failed; he should therefore not be allowed any additional costs incurred in respect of this challenge. In my judgment, the order should be limited by excluding from the plaintiff's costs any increase therein occasioned by such challenge.

For the reasons I have given I would allow the appeal and direct that the order of Crossman J. be varied to give effect to the opinion expressed by me.

*Appeal dismissed.*

Solicitors for appellant: *Attenboroughs.*
Solicitors for respondent: *Bridges, Sawtell & Co.*

P. J. B.

# *In re* CAWSTON'S CONVEYANCE AND THE SCHOOL SITES ACT, 1841.

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## HASSARD-SHORT *v.* CAWSTON.

[1939. C. 1317.]

*Education—Elementary school—Conveyance on sale of site for school—School in use for fifty years—Closed as being redundant—Reverter of site to grantor—School Sites Act,* 1841 (4 *&* 5 *Vict. c.* 38), *s.* 2—*Public Parks, Schools and Museums Act,* 1871 (34 *Vict. c.* 13), *s.* 4.

By a conveyance made in 1883, the owner in fee simple in possession of a plot of land sold and conveyed it under the School Sites Act, 1841, in consideration of 250*l.* to the vicar and churchwardens of a parish as trustees, for the purposes of the erection thereon of a school for the labouring, manufacturing, or other poorer classes of the parish and of a schoolmaster's house. The conveyance was not enrolled under the Mortmain Acts. The school and house were erected and the school used as an infants' school until 1938, when, having become redundant owing to the building of a new council school in the neighbourhood, it was closed by the trustees :—

*Held,* (1.) that, although the land was conveyed for valuable consideration by an owner entitled in fee simple, it reverted to the personal representatives of the grantor under the proviso to s. 2 of the Act of 1841 ;

(2.) that a conveyance under the Act of 1841 did not require enrolment under the Mortmain Acts ; and that, even if it had done so originally, the Public Parks, Schools and Museums Act, 1871, s. 4, had validated the conveyance.

Decision of Simonds J. [1939] Ch. 784 affirmed.

APPEAL from Simonds J. (1)

By a conveyance dated August 20, 1883, one Samuel Cawston, in consideration of 250*l.*, the full value, conveyed, under the School Sites Act, 1841, to the vicar and churchwardens of the parish of Holy Trinity, Bromley Common, and their successors, a piece of land in Addison Road, Bromley, to be held for the purposes of the Act and upon trust " to "permit the said premises and all buildings thereon now or "hereafter erected to be for ever hereinafter appropriated and "used as and for a school for the education of children and "adults or children only of the labouring, manufacturing and

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(1) [1939] Ch. 784.

"other poorer class" in the parish and as a residence for the teacher of the said school and for no other purpose. The grantor was the owner in fee simple in possession of the piece of land, which did not form part of any larger estate of the grantor adjoining it, and conveyed as beneficial owner. The conveyance was not enrolled. The school was built and used for the purposes prescribed, but in June, 1937, it became redundant owing to the building of a large council school in the neighbourhood. Notice was then given to the local education authority of intention to close the school, and it had not been used as a school since the end of the summer term, 1938.

On a division of the parish the school had become vested in the vicar and churchwardens of St. Luke's, Bromley Common, and they took out a summons asking whether, in the events which had happened, the school had reverted to the grantor of the site or his representatives under the School Sites Act, 1841.

Sect. 2 of the School Sites Act, 1841, provides: "Any "person, being seised in fee simple, fee tail, or for life, of and "in any manor or lands of freehold, copyhold, or customary "tenure, and having the beneficial interest therein, . . . . may "grant, convey, or enfranchise by way of gift, sale, or "exchange, in fee simple or for a term of years, any quantity "not exceeding one acre of such land, as a site for a school "for the education of poor persons, or for the residence of "the schoolmaster or schoolmistress, or otherwise for the "purposes of the education of such poor persons in religious "and useful knowledge."

Then followed certain provisos, including this proviso: "Provided also, that upon the said land so granted as aforesaid, "or any part thereof, ceasing to be used for the purposes in this "Act mentioned, the same shall thereupon immediately "revert to and become a portion of the said estate held in "fee simple or otherwise, or of any manor or land as aforesaid, "as fully to all intents and purposes as if this Act had not "been passed, anything herein contained to the contrary "notwithstanding."

Simonds J. said that the plaintiff had argued that the proviso for reverter had no operation on the grounds, first, that the section was not intended to apply to a conveyance by an owner in fee simple; secondly, that it did not apply where the grant was for full consideration in money; and thirdly, that the conveyance had not been enrolled in compliance with the Statutes of Mortmain and was altogether barred, with the result that the vicar and churchwardens had acquired a title by adverse possession. *Dennis* v. *Malcolm* (1) was conclusive against the first argument and he did not find it possible to differ from it on the second point. Sect. 2 of the Act distinguished in no way between a grant by way of gift or by way of sale, and the proviso for reverter equally applied in each case.

The last point rested on the necessity for enrolment. It was quite true that under the law as it stood in 1841 and 1844 a conveyance made under the authority of the School Sites Acts required to be enrolled. But the Public Parks, Schools and Museums Act, 1871, had by s. 4 made all gifts and assurances of land for the purpose of a school-house for an elementary school valid notwithstanding the statute of 9 Geo. 2, c. 36, and other statutes known as the Statutes of Mortmain. It was the statute of 9 Geo. 2, c. 36, which made enrolment necessary. The only question then was whether this grant was of a school-house for an elementary school, and it appeared to him that the purpose set out in the conveyance of 1883 was for a purpose which properly fell within the definition of "elementary education" in s. 3 of the Act of 1871.

The plaintiffs appealed. The appeal was heard on October 18, 19, 1939.

*T. K. Wigan* and *A. Newman Hall* for the appellants. The proviso for reverter does not apply when, as here, a conveyance under the Act is made by an absolute owner in fee simple. The Act says in s. 2 that the land is to revert "as fully to all intents and purposes as if this Act had not

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(1) [1934] Ch. 244.

"been passed"; and in the case of a conveyance by an absolute owner the land would not have reverted if the Act had not been passed. Simonds J. felt bound to decide against this contention on the authority of Clauson J.'s decision in *Dennis* v. *Malcolm* (1), but the Court of Appeal is not so bound. The title of the Schools Sites Act, 1841, shows that it was "an Act to afford further facilities for the conveyance "and endowment of sites for schools." Therefore it is a legitimate deduction that the mischief that the Act was to remedy was that of the difficulty of such conveyances and the consideration of the position then will reveal what those difficulties were. At the time that Act was passed manors were not mere historical survivals and the rights of the commoners were of real value. Further, at that time a very much larger proportion of the land was comprised in large settled estates in the possession of tenants for life under strict settlements, and the Settled Land Acts had not then been passed. Moreover, land suitable for a school site was often waste or common land of the manor so that the owner had no right to convey it free of the common rights. The Act was therefore directed to giving limited owners the power to make grants of land for school sites free of common rights and binding on owners in remainder. All this was conferred by the School Sites Act, 1836 (7 Wm. 4, c. 70), which was repealed by the 1841 Act. It is not clear why it was necessary to refer in s. 2 of the later Act to owners in fee simple at all, but one of the provisos to that section suggests, that it was because of the existence of common rights. On turning to the proviso for reverter it becomes clear that it was intended to protect the rights of remaindermen and commoners in case a site conveyed ceased to be used for a school site and to revive the rights barred by the Act.

Again, there can in any case be no reverter where the conveyance is by an absolute owner for value or such a grantor is expressed to convey as beneficial owner. It would have been possible for such a grantor to convey land up to one acre for a school site independently of the Act of 1841,

(1) [1934] Ch. 244.

and under the Mortmain Act of 9 Geo. 2, c. 36, provided the conveyance was enrolled.

[SIR WILFRID GREENE M.R. Two witnesses would also be necessary.]

[GODDARD L.J. Is not the whole object of the Act to induce landowners to provide sites for schools, and as an enticement to provide for reverter of the site in case it ceased to be used as a school site ?]

The Act is defined as an Act to facilitate grants of school sites and not to encourage them. Further, if that was the intention it was unnecessary to say that reverter should be as if the Act had not been passed. That suggests reverter in some cases and not others. The language of ss. 3 and 4 may be contrasted with that in the proviso to s. 2, for they provide for reverter as if the grant had not been made.

[CLAUSON L.J. A grant to a vicar and churchwardens operates under s. 7 as a grant to a corporation.]

That may be why the conveyance is stated to be made under that Act. Although the grantor here purported to convey under that Act he had power to do so as absolute owner, and in so far as there was a defective exercise of that power equity will aid it, as the conveyance was for valuable consideration: Farwell on Powers, 3rd ed., p. 378, and *Cotter* v. *Layer*. (1)

Further, there is no reverter in this case because under the proviso the site on reverter is to become a portion of the estate of which it formally formed part. Here the grantor did not own this site as part of his estate as he did not own the neighbouring land.

Lastly, there is no reverter in this case because the School Sites Act, 1841, did not remove the need for enrolment under the Mortmain Act. Here the conveyance was never enrolled and it was therefore void ab initio and the vicar and churchwardens have acquired a title to the land by adverse possession. Under the Mortmain Act enrolment was necessary and it was also provided that a gift of land for

(1) (1731) 2 P. Wms. 623.

charitable purposes would be invalid if made within a year of the grantor's death.

It is significant that the School Sites Acts, 1844 and 1849, relieved in respect of the provision as to gratuitous conveyances, but said nothing as to enrolment. But these provisions show that the Act of 1841 cannot be taken to make the Statutes of Mortmain inapplicable. But for this it might well have been thought that the Act of 1841 removed the limitations of the Mortmain Act.

The ground on which Simonds J. held that enrolment was unnecessary was that the Public Parks, Schools and Museums Act, 1871, applied. This Act by s. 4 takes any conveyance for an elementary school out of the operation of the statute of 9 Geo. 2, c. 36, "and other statutes commonly known as the "Statutes of Mortmain." Elementary school is defined in s. 3 as "a school at which elementary education is the principal "part of the education there given." As the school site here was conveyed for use "as and for a school for the education "of children and adults or children only of the labouring, "manufacturing and other poorer class in the parish," its use was not restricted to use as an elementary school. The word "adults" shows that.

The appeal should therefore be allowed.

*J. V. Nesbitt* for the respondent was not called upon.

SIR WILFRID GREENE M.R. This is an appeal from an order of Simonds J. made upon an originating summons, which raised a question in relation to the operation of the School Sites Act, 1841. That Act (the title of which describes it as "An Act to afford further facilities for the conveyance "and endowment of sites for schools," an object which the preamble declares to be expedient) repeals an earlier Act and provides by what is the crucial section for this purpose, namely s. 2, as follows: [His Lordship read s. 2 including the material proviso.] Then there are provisions dealing with the possessions of the Duchies of Lancaster and Cornwall, and various other provisions which I need not refer to; and in s. 7, which is of general application and is not limited to grants made under the powers in the Act, a provision is made, for obvious reasons of convenience, under which, to take the case which is relevant to the present argument, that of a minister and churchwardens, a grant to such minister and churchwardens is to have the special effect of causing the land granted to vest in the minister and churchwardens for the time being. Then s. 10 sets out a specimen form of grant and provides, among other things, that more than one witness to the execution by each party shall not be requisite. Those, I think, are the only sections to which I need call special attention.

It is worth noticing at the outset one or two things about that Act of Parliament. First of all, it is directed to providing greater facilities for the erection of schools, and it does so in a variety of ways; it does so by conferring upon limited owners or persons whose interests would not entitle them to make the dispositions contemplated extended powers to effect what the Act desires to have effected; and it provides that a result will follow from conveyances made under those powers which could not have followed by any means other than the operation of some statutory power, because the rule against perpetuities would have prohibited it, namely, that upon the land ceasing to be used for the stated purposes, a school site, or a schoolmaster's house, it is to revert to the estate from which it originally came. That was a thing which by no device could have been effected apart from statutory power. Another method in which the statutory power enables the existing law to be overridden is in the nature of the donees or grantees under any such grant. Taking the particular case of minister and churchwardens, a conveyance by s. 7 is to have the operation of vesting the land in the minister and churchwardens for the time being. That is a thing which could not have been effected apart from statute, because the minister and churchwardens are not a corporation. It is important to bear in mind those considerations in view of the arguments that have been raised on behalf of the appellants. One can see that the provision with regard to reverter would have been and no doubt was considered by the Legislature to be a very useful encouragement to charitably minded persons, particularly if they were the owners of an estate or life tenants of a settled estate, to make grants for purposes such as these, because such persons might very well be satisfied to have the village school built upon the family estate, but would strongly object to the site on which such a school had been built being diverted later on to other purposes; therefore, as I have said, that proviso as to reverter must have been a very valuable encouragement, because land owners by reason of it were thus enabled to ensure that the site should be used in perpetuity for school purposes or, if it ceased to be used for school purposes, that they would get it back. The common sense of that is obvious.

On August 20, 1883, a Mr. Samuel Cawston, living at Bromley in the county of Kent, conveyed to the minister and churchwardens of the parish of Holy Trinity, Bromley Common, a piece of land on which a school had then recently been erected. Mr. Cawston appears to have been a land owner in the neighbourhood, but this particular piece of land was not part of his estate and, indeed, appears to have been an isolated purchase. I may say, before looking further at the deed, that the minister and churchwardens of the parish of Holy Trinity, Bromley Common, are now replaced by the vicar and churchwardens of St. Luke, Bromley Common, by reason of a rearrangement in the matter of parish boundaries, or something of that kind, but that is a mere circumstance of history and does not affect the questions which we have to decide.

The conveyance, after reciting the acquisition of the piece of land by Mr. Cawston and the erection of the school, witnesses as follows: That under the authority of (giving it the short title) the School Sites Act of 1841 and of an Act of the 8th Victoria explaining the same and in consideration of the sum of 250*l.* paid to Mr. Cawston by the minister and churchwardens, who are described as the trustees, Mr. Cawston as beneficial owner conveyed unto the trustees and their successors the piece of land in question together with the school built thereon " To hold unto and to the use of the "said trustees and their successors in fee simple for the "purposes of the said Act and upon trust subject nevertheless "to the proviso hereinafter contained to permit the said "premises and all buildings thereon now or hereafter erected "to be for ever hereafter appropriated and used as and for "a school for the education of children and adults or children "only of the labouring manufacturing and other poorer "class in the parish of Holy Trinity Bromley Common afore-"said or of any new district which may hereafter be assigned "therefrom and as a residence for the teacher or teachers of "the said school and for no other purpose which said school "shall always be in union with and conducted upon the "principles and in furtherance of the ends and designs of the "incorporated National Society for promoting the education "of the poor in the principles of the Established Church." Then there is a provision under which the trustees are empowered at the request of the National Society, but not otherwise, to convey for educational purposes to any body corporate or persons authorized by law the estate or interest thereby vested in them. Then there is a provision as to the management of the school, and certain provisions as to restrictive covenants, with regard to which we are not concerned.

If there is one thing which is to my mind clear beyond possibility of controversy, whatever the effect of it may be, it is that the intention of Mr. Cawston when he executed this conveyance was to execute a conveyance which should operate by virtue of the provisions of the Act and would carry with it all the consequences that the Act provides for. Mr. Cawston purports to convey under the authority of that Act and under no other authority, and he conveys it to trustees for the purposes of the said Act, and therefore, merely looking at the construction of this document, it is perfectly clear that it is to be referred to the statutory power which Mr. Cawston had by virtue of the Act of 1841. One would have thought that on that basis the necessary result would be that all the consequences laid down in the Act would follow. The result of this conveyance was that, by virtue of s. 7 of the Act and not by virtue of any power outside that section, the land conveyed vested in the minister and churchwardens for the time being; further, by virtue of the provisions of the Act, it was intended as clearly as anything could be that once the condition was fulfilled under which the reverter proviso in s. 2 of the Act was to come into operation, reverter should take place. In point of fact, the circumstances which that proviso contemplates have in this particular case come into operation, and hence arises the controversy between Mr. Cawston's representative and the vicar and churchwardens of the present parish of St. Luke, the former saying that the reverter clause has an application in his favour and the latter saying that it has no application in the present case. There could be no question whatever, in my judgment, if the case had been one of a limited owner. A tenant for life could not have suggested for one moment that the deed could have effect according to its terms apart from the statutory power conferred by the Act of 1841, which would necessarily carry the statutory consequences. The only colour of plausibility which can be given to the main argument of the present appellants is due to the circumstance that Mr. Cawston was the absolute owner of this land. By way of a background Mr. Wigan suggested that the real matter with which s. 2 was concerned was really the case of limited owners or persons like the lords of manors who had not full power of disposition. I am unable to regard that argument as one which carries any result, because although no doubt those cases were very typical cases, and might well have been the most common cases especially at that date, nevertheless s. 2 provides, as clearly as any section could provide, for the case of the absolute owner, and accordingly I do not find that there is anything in that suggestion which in any way assists the argument of Mr. Wigan.

But then he says that Mr. Cawston, being an absolute owner, had the power to convey this piece of land to trustees for charitable purposes, subject, of course (if indeed it applied), to the law relating to Mortmain and Charitable Uses, and he says that the conveyance must be given an operation by virtue of his absolute ownership and not by virtue of some power in the Act which really was not necessary to make the conveyance effective. I cannot accept that argument. As I have already pointed out, there are two things which could not be effected by a conveyance by an absolute owner outside the Act. One was the introduction into the consequences of the transaction of the provision as to reverter. That it was the intention that that provision should operate is clear on the face of this document in spite of the fact that, quite naturally, no express reference is made to it. The other respect in which the result quite clearly intended and contemplated could not have been effected was the vesting in the minister and churchwardens for the time being. It appears to me that as a pure matter of construction of this document the references to the powers of the Act of Parliament mean that the document is to be construed as one which is intended to have those two consequences. Those two consequences were consequences which, as I have said, Mr. Cawston as absolute owner could not possibly have effected apart from the power conferred upon him by the statute. In connection with his argument Mr. Wigan relied upon the phrase in s. 2, that the land granted should revert to and become a portion of the said estate, namely, the estate out of which it was carved, as fully to all intents and purposes as if this Act had not been passed. He says that if the Act had not been passed, then in the case of a conveyance by an absolute owner there never would have been any reverter and, therefore, there cannot in such a case be a reverter under the terms of the proviso. But, in my opinion, that argument really will not bear examination. It is based upon a construction of this proviso, which appears to me to be quite hopelessly narrow. The phrase "revert . . . . as fully to all intents "and purposes as if this Act had not been passed" in relation to any conveyance which is made under the Act is really a quite inaccurate expression to begin with, because if the Act had not been passed, the conveyance, so far as it required the Act to give it validity, would never have been made and, therefore, there would never have been any question of the land leaving the grantor; in fact what it means, it appears to me, is merely this, that in the circumstances stated the land is to come back and join up again with the estate from which it was derived as though the transaction carried out under the powers of the Act had never taken place.

I have endeavoured to express on this part of the argument in my own language my reasons for thinking that the argument cannot prevail. In point of fact the precise point on this part of the argument has already been dealt with in a decision of Clauson L.J., Clauson J. as he then was, in the case of *Dennis* v. *Malcolm*. (1) He there decided the point against the party who was then putting it forward, and decided it, if I appreciate his reasons rightly, on grounds similar to those which I have expressed, although perhaps not stated with the fullness with which I have thought it right to state them in order to put the matter in my own language.

With regard to the next two points which Mr. Wigan took, the first of them was that no reverter will take place where the conveyance is by an absolute owner for his own benefit who either conveys for value or is expressed to convey as beneficial owner. That appears to me to be quite unfounded. The section itself contemplates the grant by way of sale and the fact that certain covenants are now implied where the grantor conveys as beneficial owner, does not appear to me in any way to take away the perfectly clear operation of the conveyance which was made (as I have already said) with the intention of executing and in pursuance of the powers conferred by the Act of 1841 and with the intention that the statutory scheme laid down in the Act should apply.

Then comes the next point, which was not taken below (I need really do no more than state it because I think it stands self-condemned), that reverter cannot take place in the present case because this piece of land was a piece of land by itself and never formed part of any estate. It is sufficient to say that that construction of the section would make it impossible for anyone who merely held one acre or less to grant it for the purposes indicated, whereas a person who had an acre and a quarter and conveyed an acre and

(1) [1934] Ch. 244.

kept the quarter would apparently get the benefit of reverter. That argument, in my judgment, is putting much too narrow a construction on the language of the proviso.

The next and the last point is this. It is said that the Act of 1841 does not exempt conveyances made under it from the provisions of the Mortmain and Charitable Uses Acts in force at the relevant time, that when this conveyance was made enrolment under those Acts was necessary, that no such enrolment took place, that the conveyance accordingly was void, and that in the result the present appellants have acquired a title under the Statute of Limitations. I do not pause to enquire whether if the first of these propositions was right the consequence stated would follow. There are obvious points which would have to be carefully considered if we ever got to that stage but, in my opinion, the argument fails at an earlier stage. In my opinion the Act of 1841 is a code in itself with regard to the particular subject-matter with which it deals, and conveyances made under it are not conveyances to which the Mortmain Act then in force, the Act of George II., applied. When I look at that Act I find (stating it quite shortly) that no land should be granted in trust for any charitable uses unless certain things were complied with, among others enrolment within six calendar months and execution (except in the case, I think I am right in saying, of conveyances for value) not less than twelve months before the death of the grantor. When I look at the Act of 1841, I find that it says in terms in s. 2 that a particular kind of conveyance to charitable uses may be made, thereby contradicting and making an exemption from the general statutory prohibition in relation to grants for charitable uses which the Act of George II. imposed. In my opinion the particular and special provisions of the Act of 1841 had the effect of exempting from the general provisions of the Act of George II. a conveyance made in accordance with the Act of 1841. The only grounds which might be relied upon as pointing in the opposite direction are grounds which, before Simonds J., led Mr. Nesbitt, who appears for the respondent, not to argue to the contrary; and Simonds J. assumed, without deciding, that the provisions of the Mortmain Act, George II., would have applied. Those grounds are, first, in the Act itself the reference in s. 10 to the provision that not more than one witness shall be necessary (the Mortmain Acts provided for two witnesses). It is said that that is an indication that subject to that modification the other provisions of the Mortmain Acts are to remain in operation. I do not find this point convincing.

The next ground suggested is that in a later Act of 1844, the School Sites Act of that year, s. 3, there is an express enactment that conveyances made under s. 2 of the Act of 1841 are to be valid although the donor shall die within twelve calendar months from the execution thereof. It is said that if the Mortmain Acts had not applied, that provision would have been quite unnecessary. I think I am right in saying that there is another exception, namely, s. 4 of the Act of 1849, which gives very extended powers of grants for school purposes going very far beyond what the Act of 1841 provided for, and it is provided, in terms, in that section that such grants shall be valid even if the grantor dies within twelve calendar months. It is to be observed that the Act of 1844 is not an Act described as an Act to amend the Act of 1841, but in the long title, which is the only title at that date, the Act is described as an Act to explain the Act of 1841, and there are similar words in the title to the Act of 1849. We are all of us familiar with the case where an ingenious point of doubt is raised and, if the statute is one of far reaching and general application, an indulgent Legislature prefers to set the doubt at rest rather than leave it a subject of controversy and perhaps of litigation. The fact that the provision to which I have referred comes in by way of explanation leads me strongly to think that that was the origin of that particular section in the Act of 1844 and the Act of 1849, but, however that may be, the presence of those sections in the later legislation does not lead me to construe the Act of 1841 in a way other than that which I have indicated, namely, that it is a code outside the Mortmain Act. If I am wrong in the view which I have formed, that conveyances under the Act of 1841 did not originally require enrolment, still I agree with the conclusion of Simonds J., who held that at the relevant date, namely August 20, 1883, the date of the conveyance, the necessity for complying with the formalities of the Mortmain Acts had, in regard to this transaction, been removed by an Act passed in the year 1871, the short title of which is: "The Public Parks, Schools and Museums Act, 1871." That Act provides by s. 4 that assurances of land for the purposes only of a school-house for an elementary school shall be valid notwithstanding the Statute of the Ninth George II. and other statutes commonly known as the Statutes of Mortmain. Accordingly, if this conveyance is a conveyance for the purposes only of a school-house for an elementary school, there was no need for any enrolment. Sect. 3 of the Act defines the words " elementary school " as meaning " a school "or department of a school at which elementary education is "the principal part of the education there given, and shall "not include any school or department of a school at which "the ordinary payments in respect of the instruction from "each scholar exceed ninepence a week." No question, I may say in passing, arises as to any relevance in those latter words about the ninepence a week. The word " school-house " is defined as including the teacher's dwelling-house, and the playground. The question therefore is: Is this conveyance one of that character? The purposes for which the grant is made by the conveyance are, as I have already read, to permit the premises to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring, manufacturing and other poorer class in the parish, with a reference to the principles of the National Society. That, of course, must be read in the light of the circumstance that the conveyance is a conveyance which purports to be made under the powers conferred in the Act of 1841, and the habendum is, in terms, described as " for the purposes of the said Act " ; accordingly, on ordinary accepted principles, it would not be proper to construe the purposes set out in this document as extending beyond those contemplated by the Act unless by clear language we were forced to do so. I therefore construe the purposes in this document by reference to the permissible purposes under s. 2 of the Act and I limit them within the four corners of the purposes so stated, and those purposes are "a school for the education of poor persons, or for the residence "of the schoolmaster or schoolmistress, or otherwise for the "purposes of the education of such poor persons in religious "and useful knowledge." An education of that character in relation to the poor persons indicated in the year 1841 can, in my opinion, only have meant and been understood as meaning what now in more modern phraseology is called elementary education or, at any rate, did not extend beyond it. It is to be noticed that there is no definition of "elementary "education" in the Act of 1871, to which I have referred, nor, so far as I am aware, is there in any other Act of Parliament any statutory definition of it. In point of fact "elementary "education" is anything that is not secondary or higher education, and what that has come to mean is a matter that has been developed in practice. Looking back to the Act passed in these terms in 1841, I have no hesitation in holding that the education which is there contemplated is the same thing as is comprised within the phrase "elementary "education" in the Act of 1871.

On all those grounds I am of opinion that this argument with regard to the Mortmain Acts fails. Mr. Wigan helped the Court very much with a full and careful argument, but he has quite failed to persuade me that the decision of the learned judge was in any respect wrong, and the consequence is that the appeal must be dismissed.

CLAUSON L.J. I agree. Beyond thanking Mr. Wigan, on my own behalf, for his very interesting argument, I have nothing to add.

GODDARD L.J. I agree.

*Appeal dismissed.*

Solicitors: *Day & Son; Dennes & Co.*

H. C. G.

## *In re* PADDINGTON ESTATE.

[1938. P. 2755.]

BENNETT J.

1939

July 10, 11.

*Settled land—Improvements—" Small dwellings "—Definition—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *Sch. III., para.* (*xxii.*).

Residential flats (each of which is intended to be separately occupied by a workman and his family), consisting of from two to five rooms and contained in a block of buildings erected for the purposes of workmen's dwellings, are " small dwellings " within the meaning of para. (xxii.) of Sch. III. of the Settled Land Act, 1925.

AN ORIGINATING SUMMONS was taken out by the trustees of the Paddington Estate (which is situate in the parish of Paddington in the County of London and which consists of about 600 acres of land) for a declaration (inter alia) that the buildings to be erected on the land under a scheme were small dwellings within the meaning of para. (xxii.) of Sch. III. of the Settled Land Act, 1925 (1), and that the erection thereof was not injurious to the Paddington Estate.

The buildings, which the trustees were desirous of erecting consisted of flats varying in size from two to five rooms. It was intended that each flat should be separately occupied.

The scheme also offered special advantages such as a children's crèche, direct sunlight for all rooms, a community centre with a club room, social facilities for the tenants, passenger lifts and a special children's play area.

*G. P. Slade K.C.* for the applicants.

*A. H. Ormerod*, *L. M. Jopling* and *R. W. Goff* for the various respondents.

BENNETT J. The summons, amongst other questions, asks: That it may be declared that the buildings to be erected upon the land referred to in the scheme are small dwellings within the meaning of para. (xxii.) of Part I. of the Third Schedule of the Settled Land Act, 1925, and that the erection thereof is not injurious to the Paddington Estate.

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(1) Settled Land Act, 1925, Sch. III., para. (xxii.): " The "provision of small dwellings, "either by means of building new "buildings or by means of the "reconstruction, enlargement, or "improvement of existing buildings, if that provision of small "dwellings is, in the opinion of "the Court, not injurious to the "settled land or is agreed to by "the tenant for life and the "trustees of the settlement."

The scheme shows that the trustees of the Paddington Estate desire to erect upon a part of the land vested in them some workmen's dwellings. These workmen's dwellings are to be provided in buildings containing a number of flats, each flat varying in size consisting of from two to five rooms. It is intended that each flat shall be separately occupied by a working man and his family. The Settled Land Act, 1925, authorizes the expenditure of capital moneys upon, amongst other things, the provision of small dwellings, either by means of building new buildings or by means of the reconstruction, enlargement, or improvement of the existing buildings, if that provision of small buildings is, in the opinion of the Court, not injurious to the settled land. This provision is to be found in para. (xxii.) of Part I. of the Third Schedule to the Act, and it replaces the provisions of s. 74 of the Housing of the Working Classes Act, 1890, which was repealed by the Settled Land Act, 1925. Sub-s. 1 (*b*) of s. 74 of the Housing of the Working Classes Act, 1890, included, amongst the improvements upon which capital moneys under the Settled Land Act, 1882, might be expended, cottages for farm labourers, farm servants, and artisans, whether employed upon the settled land or not, and any dwellings available for the working classes, the building of which, in the opinion of the Court, was not injurious to the estate. In the Settled Land Act, 1925, there is a definition of " small dwellings." That definition is to be found in para. 25 of sub-s. 1 of s. 117, and the terms of it are these : " ' Small dwellings ' mean dwelling-houses of a rateable "value not exceeding one hundred pounds per annum."

The question is whether each of these flats is a small dwelling within the meaning of that definition. If so, para. (xxii.) of Part I. of the Third Schedule of the Act, authorizes the expenditure of capital moneys upon a building which contained a number of these small dwellings. In my judgment each one of the flats which will be contained in the blocks of buildings, which the scheme shows that the trustees desire to erect, is a small dwelling within the meaning of para. (xxii.) of Part I. of the Third Schedule. Each, if separately occupied, can be separately assessed. Having regard, as I think one is entitled to do, to the modern habits of the working classes, I feel, myself, no doubt that each flat is a small dwelling within the meaning of the definition, and I so decide the first part of the question asked in the summons.

There remains the question whether the provision of these small dwellings is or is not injurious to the settled land. The evidence of the trustees makes it plain that if regard is to be had to the interests of the whole of the estate, consisting of some hundreds of acres of land in the neighbourhood of Paddington, upon which both rich and poor live, proper provision must be made to accommodate the less wealthy members of the community. The evidence establishes that, so far from being injurious, the provision of housing accommodation for the working classes of the kind proposed must improve the value of those parts of the trustees' property which are occupied by wealthier people. Again I feel no hesitation in declaring that the erection of these small dwellings will not be injurious to the Paddington Estate—the settled land with which this summons is concerned.

Solicitors: *Trower, Still & Keeling*; *Budd, Brodie & Hart.*

J. L. D.

BENNETT J.

1939
July 25.

## *In re* PAINE.

## *In re* WILLIAMS.

## GRIFFITH *v.* WATERHOUSE.

[1939. P. 542.]

*Conflict of laws—Will—Marriage abroad in 1875 by German subject with deceased wife's sister—English domicil of wife—Validity of marriage contract—Effect on bequest to child of marriage.*

A testatrix, who died in 1884, bequeathed 250*l.* on trust for her daughter for life and, in the event of her dying leaving any child or children her surviving, in trust for her absolutely. In the event of her death without leaving any child or children her surviving, the testatrix directed that the money should be held on the trusts therein mentioned.

In 1875 the testatrix's daughter, while domiciled in England, married her deceased sister's husband, who was a German subject. The marriage took place in Germany and was in accordance with the laws of Germany, by which such a marriage was valid. There were three children of the marriage of whom one survived the testatrix's daughter:—

*Held*, that, as at the time of the marriage the testatrix's daughter had not the capacity to contract the marriage—the marriage being, at that time, a contract of marriage which could not be made by English law—the absolute gift failed and the gift over took effect.

*Mette* v. *Mette* (1859) 1 Sw. & Tr. 416 followed.

ADJOURNED SUMMONS.

By her will dated April 6, 1883, Mary Ann Williams, the widow of John Pownall Williams, directed that 900*l.* (being part of a trust fund settled on her under the will of her father, Thomas Paine) should be held by her trustees on trust to pay the interest, dividends and proceeds arising from the investments, as and when received, to her daughter Gertrude Paine Pownall Whitley during her life for her sole and separate use and benefit, independent of the debts, control or engagements of any husband " and in case my said daughter shall have any "child or children who shall be living at the time of the "decease of my said daughter Upon trust as to the said "principal sum of 900*l.* and the stocks funds and securities "representing the same for my said daughter Gertrude Paine "Pownall Whitley her executors administrators and assigns "absolutely but in case my said daughter shall die without "leaving any child or children her surviving then upon trust "to pay the said sum of 900*l.* and any interest dividends or "produce thereon or therefrom unto and equally between "such of them my son and daughters Peter Paine Pownall "Williams Fanny Paine Williams and Emma Paine Pownall "Wilkinson as shall be living at the death of my said daughter "Gertrude Paine Pownall Whitley absolutely."

The testatrix also directed as follows: " As to the sum of "250*l.* further part of the said trust monies upon trust for my "daughter Ada Paine Toepfer upon the same or the like "trusts as are hereinbefore set forth in regard to the portion "given to my said daughter Gertrude Paine Pownall Whitley "or as near thereto as the circumstances will permit except "that in case my said daughter Ada Paine Toepfer shall die "without leaving any child or children her surviving the said "sum of 250*l.* and any interest dividends or produce thereof or "therefrom shall be equally divided between such of them my "said daughters and son Gertrude Paine Pownall Whitley "Emma Paine Pownall Wilkinson Clara Paine Williams "Fanny Paine Williams and Peter Paine Pownall Williams as "shall be living at the decease of the said Ada Paine Toepfer "absolutely."

The testatrix died on May 21, 1884.

The testatrix's daughter Ada Paine Toepfer married Frantz Robert Toepfer at Frankfurt on Main in Germany, on June 1, 1875, in accordance with the laws of Germany, by which such marriage was valid. Frantz Robert Toepfer had before his marriage with Ada Paine Toepfer been married to her sister Mary Ann Paine Williams. That marriage took place on July 18, 1871, and she died in August, 1872.

Frantz Robert Toepfer was born in Germany and, according to the evidence, he remained a German subject until his death on October 22, 1919. He and his second wife both lived in England until their respective deaths and there was issue of the marriage, three children, one of whom, Maud Ada Mary Waterhouse, survived her parents.

A summons was taken out by the legal personal representative of the last surviving trustee of the wills of Thomas Paine and the testatrix for the determination of the question whether the above mentioned sum of 250*l.* was held on trust for the legal personal representatives of Ada Paine Pownall Toepfer on the footing that the expression " child or children " included a child or children of her marriage with Frantz Robert Toepfer or upon trust for the legal personal representatives of Emma Paine Pownall Wilkinson, Fanny Paine Williams and Peter Paine Pownall Williams in equal shares, and generally that it might be declared who was entitled to the said sum.

*C. D. Myles* for the applicant. This marriage does not invalidate the absolute gift. The case comes within the exception which Professor Dicey appears to adopt: see Dicey's Conflict of Laws, 5th ed., p. 756, note (*q*). His interpretation of *Savigny's* case (Savigny, s. 379, pp. 291, 292) is directly in favour of the applicant's contention. [He also referred to *In re Loveland* (1) and *Mette v. Mette*. (2)]

*Herbert Hart* for the respondent. This marriage, even on the footing that the husband was domiciled in Germany, was invalid. It takes two to make a contract. If one is incapacitated, there can be no contract. [He referred to *Brook v. Brook*. (3)]

*Mette v. Mette* (2) lays down the principle, which is perfectly applicable in this case, that it must be within the capacity of both parties to enter into the contract.

BENNETT J. [after stating the facts, continued:] I think that, on the evidence, I must hold that the husband never lost his domicil of origin, but it is plain that, at the time of the marriage, Mrs. Ada Paine Toepfer was a domiciled English woman. There were three children of the marriage, of whom one survived Ada Paine Toepfer, and the question to be determined is whether Ada Paine Toepfer had a child or children living at her decease, in which case the sum of 250*l.* is to be held by the trustees of the testatrix's will for her absolutely, or whether she died without leaving any child or children her surviving, in which case the sum of 250*l.* would devolve as under an intestacy.

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(1) [1906] 1 Ch. 542.

(2) 1 Sw. & Tr. 416, 423.

(3) (1861) 9 H. L. C. 193, 234.

The first question is whether the English law will regard the marriage between Ada Paine Toepfer and Franz Robert Toepfer as a valid marriage.

In my judgment, according to English law, the marriage was invalid, because by English law the lady had not the capacity to contract it. In my view that point is settled by the decision of Sir Cresswell Cresswell in *Mette v. Mette.* (1) That was a case in which the husband was domiciled in England and he was without the capacity to contract the marriage in question. The learned judge says in the course of his judgment: "If "Bernard Mette was incapacitated from contracting such a "marriage, this latter distinction cannot have any effect. "There could be no valid contract unless each was competent "to contract with the other. The question rests upon the "effect of domicil and naturalization."

That statement of the law has been recognized by text book writers. In particular I refer to Dicey's Conflict of Laws, 5th ed., p. 732, where the following statement appears: "Rule 182. Subject to the exceptions hereinafter mentioned, "a marriage is valid when (1.) each of the parties has, according "to the law of his or her respective domicil, the capacity to "marry the other."

In Westlake's Private International Law, 7th ed., p. 57, r. 21, this statement is to be found: "A marriage is invalid ". . . . if either party is by his personal law under an "incapacity to contract it, whether absolute, in respect of "age, or relative in respect of the prohibited degrees of "consanguinity or affinity."

In Halsbury's Laws of England, 2nd ed., vol. vi., p. 286, it is stated: "The marriage must be a good and legal marriage

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(1) 1 Sw. & Tr. 416.

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"according to the law of the domicil of both contracting "parties at the time of the marriage."

On the authority of *Mette v. Mette* (1), supported as it seems to be by the text book writers, in view of the fact that the domicil of the lady was English, I come to the conclusion that her marriage, in the year 1875 to a domiciled German, at Frankfurt on Main in Germany was invalid, because the husband had been the husband of the lady's deceased sister. The marriage was, therefore, a contract of marriage which, at that time he was prohibited from making by English law.

It follows that the gift over takes effect, unless it can be said that the testatrix intended to refer to the children of the union of the lady with Mr. Toepfer as the children who survived the lady.

That depends upon whether there is a context in the will, which enables me to say that the testatrix had in mind the child or children of Ada Paine Toepfer by Frantz Robert Toepfer.

In my judgment there is nothing in the language of the will of the testatrix which enables me to arrive at that conclusion.

The gift over takes effect and the absolute gift to the lady in question fails.

Solicitors: *Kingsford, Dorman & Co., for Price, Atkins & Price, Birmingham; J. Westcott & Sons, for Mogford, Son & Warwick, Birmingham, and R. Evans Parr & Co., Birmingham.*

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(1) 1 Sw. & Tr. 416.

J. L. D.

## *In re* FITZHERBERT-BROCKHOLES AGREEMENT.

## RIVER WYRE CATCHMENT BOARD *v.* MILLER.

[1939. F. No. 880.]

BENNETT J.

1939
*Oct.* 31;
*Nov.* 1.

*Local Government—Drainage areas—Catchment board—Duty to commute obligations—Covenant by landowner to contribute to repair and maintenance of drainage works—Payments by successor in title not party to covenant—Voluntary payments—Land Drainage Act,* 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 9, *sub-s.* 1.

An owner of land in a drainage area entered into a covenant, under a deed made in 1853, to contribute towards the cost of the repair and maintenance of certain drainage works in that area. After his death his successor in title, who was not a party to the covenant, paid in each year from 1920 to 1931 the amount which her predecessor in title had covenanted to pay:—

*Held,* that these were voluntary payments and were not an "obligation" which, under s. 9, sub-s. 1, of the Land Drainage Act, 1930, it was the duty of the catchment board, constituted under that statute, to commute.

ADJOURNED SUMMONS.

By s. 1 and s. 3 of the Land Drainage Act, 1930, catchment boards were constituted for the purpose of supervising the drainage of certain drainage areas. In the Wyre area there is a watercourse known as the Skippool Main Dyke, for the repair and maintenance of which the Wyre Catchment Board has been responsible since August 26, 1931.

By a deed of August 2, 1853, Thomas Miller, as one of the owners of land which was drained principally by means of the main dyke which fell into Skippool Pool, entered into a covenant that he, his heirs and assigns, owners for the time being of any of the lands to be benefited by certain improvements of the drainage of the land, would "from time to "time pay and contribute . . . . their respective rateable "proportions of the costs and expenses of and incident to the "improvement of the said drainage and the maintenance "thereof . . . . "

Until August, 1931, the repair and maintenance of the dyke was under the management of a committee set up under the deed of August 2, 1853.

In 1920, Mrs. Frances Isette Jessie Miller became entitled to the land of which Thomas Miller had been the owner, and from 1920 to 1931 she paid in each year the amount which had formerly been paid by her predecessor in title under the above mentioned covenant.

Since 1931, the catchment board arranged with the committee that their agent should continue the cleaning of the dyke.

In December, 1938, formal notice was given, under s. 9, sub-s. 1 (1), of the Act, to Mrs. Miller by the Board of their intention to commute the obligation, alleged by them to rest on her, to contribute towards the maintenance of the watercourse known as Skippool Main Dyke, and a summons was subsequently taken out by the Board for the purpose of obtaining a declaration that there was an obligation imposed on the defendant (Mrs. Miller), which it was the duty of the Board to commute.

*Ralph Etherton* for the plaintiffs. The defendant has incurred an obligation which it is the duty of the catchment board to commute. The Court is asked solely to decide whether there is an " obligation " under s. 9, sub-s. 1, of the statute. Although the defendant was not a party to the deed, she had become subject to an obligation to pay, as the successor in title to a person who has entered into the obligation under the deed. The obligation arises partly as a result of the agreement and partly by reason of the obligations which have been assumed by her over a long period of years as a result of the agreement.

(1) Land Drainage Act, 1930, s. 9, sub-s. 1: " It shall be the "duty of every catchment board "to take steps for the commutation of all obligations imposed on "persons by reason of tenure, "custom, prescription or other- "wise, to do any work (whether "by way of repairing of banks, "maintaining of watercourses or "otherwise) in connection with "the main river."

BENNETT J.

1939

FITZHERBERT-BROCKHOLES AGREEMENT, *In re.*

RIVER WYRE CATCHMENT BOARD *v.* MILLER.

He referred to *Morland* v. *Cook* (1), and *Austerberry* v. *Corporation of Oldham.* (2)

*H. A. Hill* for the defendant was not called on to argue.

BENNETT J. [after stating the facts, continued:] The defendant is not a party to the deed. She has succeeded to lands owned by Mr. Thomas Miller, a party to the deed, lands which benefited from the drainage and in respect of which a rate was imposed on him not only for the maintenance but for the execution of the drainage works. Mr. Miller has been dead for some years and the defendant apparently succeeded to his lands at some time before the year 1920. The question is whether it is possible for the plaintiffs to say that, under the deed of 1853, there was or is upon the defendant an obligation imposed either by reason of tenure, custom, prescription or otherwise. No obligation is imposed on her by tenure, by custom or prescription. How otherwise is any obligation imposed on her? It is conceded that, having regard to the fact that the covenant was one to expend money entered into by the predecessor in title of the defendant, the burden of it did not run with the land owned by the original covenantor. It is said that the obligation arises under the agreement partly because of its terms and partly because of the obligation having been assumed and discharged over a long period of years because of the agreement. I do not understand how, if somebody voluntarily chooses to pay a sum of money without being under any obligation to do so, it can consequently be asserted that that person is under an obligation. I can see on the facts proved no ground from which it is possible to say that there is any obligation resting on the defendant, which it is the duty of the plaintiffs to commute.

The result is that in my judgment the summons fails and must be dismissed with costs.

Solicitors: *Norton, Rose, Greenwell & Co., for A. H. Jolliffe, Preston; Gregory, Rowcliffe & Co., for Finch, Johnson & Lynn, Blackpool.*

J. L. D.

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(1) (1868) L. R. 6 Eq. 252.

(2) (1885) 29 Ch. 750, 774.

*Observations of* MORTON, J., at p. 63, *applied.* McKEE *v.* McKEE. [1951] 1 All E.R. 942.

MORTON
J.
1939
*July* 21.

## *In re* B——'S SETTLEMENT.

B—— *v.* B——.

*Approved.* McKEE *v.* McKEE [1951] A. C. 352

[1939. B. 310.]

*Infant—Custody—Ward of Court—Previous order of foreign Court—Welfare of infant—Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 1.

By s. 1 of the Guardianship of Infants Act, 1925: "Where "in any proceeding . . . . the custody . . . . of an infant . . . . is in "question, the court, in deciding that question, shall regard the "welfare of the infant as the first and paramount consideration, "and shall not take into consideration whether from any other point "of view the claim of the father, or any right at common law "possessed by the father, in respect of such custody, . . . . is "superior to that of the mother, or the claim of the mother is "superior to that of the father."

Whatever may have been the position before the Act, the Court is always bound to exercise a judgment of its own when dealing with the custody of a ward. Under s. 1 the Court is bound to consider first the welfare of the infant and to treat it as the paramount consideration. In so doing the Court ought to give due weight to any views formed by the Courts of the country of which the infant is a national: but the Court is bound in every case to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country. Any observations in *Nugent* v. *Vetzera* (1866) L. R. 2 Eq. 704 or *Di Savini* v. *Lousada* (1870) 18 W. R. 425, stating or implying a contrary view, ought not to be followed at the present day.

SUMMONS.

This was an application for custody by the father of an infant who had been made a ward of Court. The father was a Belgian national and the mother a British national who took Belgian nationality on marriage to him, and the infant was born in Belgium. The mother was granted a divorce by a judgment of the Court in Belgium, but the judgment was reversed and the father became entitled to custody by the common law of Belgium. The mother, who had gone to live in England, visited Belgium and was by arrangement given the custody of the infant for some days. She took him to England and did not return him, and at the date of these proceedings he had been living with her, and going to school, in England, for nearly two years.

The father began divorce proceedings in Belgium, and on October 5, 1937, the Court in Belgium appointed him guardian pending the proceedings, gave him the custody, and ordered the mother to return the infant within twenty-four hours of service of the order on her. She did not return him within that time or at all, and the Correctional Court in Brussels fined her for disobedience, sentencing her to imprisonment should the fine not be paid. She gave notice to oppose the Correctional Court's order, but at the adjourned proceedings did not appear, and the Correctional Court confirmed the order.

By this summons the father asked (1.) that the mother do forthwith, or within four days of the order to be made, deliver up the infant to the father, and that the custody of the infant be given to the father: (2.) that the father be at liberty to take the infant to Belgium and keep him there, and to determine all questions as to him without any leave of or application to the Court: (3.) that the mother pay the costs of the application: and (4.) that such further or other order as to the Court should seem fit might be made as to the custody and residence of the infant, as to his education, and as to access to him.

*Andrew Clark* for the father. If there arises any question as to the custody of an infant in a case where the father, mother, and infant are all domiciled in England, there is no machinery, and no form of proceedings, for taking the infant from the father. The greater part of the evidence in the case has been directed to justifying the mother's departure from the father, and the allegations against him are as a husband, not as a father. The case is one in which it would not be proper to allow the mother, as a litigant, to gain an advantage, for she does not come to the Court with clean hands.

The Court will not interfere with the Belgian Court's order. The infant is a foreign national. It would not be right for the Court to assume jurisdiction over a foreign infant who has already been dealt with by a foreign Court. To do so would be contrary to the principles of international law and the comity of nations: and it is to be remembered, further, that the order and confirmatory order of the Correctional Court were orders of a Court other than that in which the father began divorce proceedings.

In order to prove her case, the mother must show that the consequence of the infant's being returned to his father would be to endanger his health and mental capacity: and it is far more desirable that the infant should not be deprived of his father's care than of his mother's. [He referred to *Nugent* v. *Vetzera* (1) and *Di Savini* v. *Lousada*. (2)]

*E. M. Winterbotham* for the mother. The fact that formerly, where parents and infant were all domiciled in England, there were neither machinery nor proceedings to take the infant from the father presents no difficulty now. The practice has been changed by the Guardianship of Infants Act, 1925, and there is no longer a presumption that the father is entitled to custody.

Further, it is not the case that the allegations against the father are against him as a husband, not as a father. It is alleged that he is a man who ought not to have the custody of an infant.

The mother is not seeking to gain an advantage as a litigant or at all. It is the infant who, although he is not a plaintiff on this summons, is a plaintiff on the proceedings under the settlement: and it is inappropriate to describe him as not coming to the Court with clean hands. In asking the Court to let her keep the custody of the infant, the mother is thinking solely of his benefit.

The argument that the Court will refrain, in deference to the principles of international law and the comity of nations, from exercising jurisdiction over a foreign infant who has already been dealt with by a foreign Court is open to question: and to say that the mother must show that the consequence of the infant's being returned to his father would be to endanger his health and mental capacity is putting the case far too high.

MORTON J. The child with regard to whom these

(1) (1866) L. R. 2 Eq. 704.

(2) (1870) 18 W. R. 425.

proceedings are before me is a boy of eleven, born on March 21, 1928, in Belgium. He is a ward of Court, having been made a ward of Court by the institution of proceedings in his name on January 21, 1939, for administration of the trusts of a settlement, no doubt made for the purpose of making him a ward of Court, under which he is interested. The application now before me is a summons by the father of the boy for an order. [His Lordship then stated the relief asked on the summons, and stated the facts, the details of which are not however necessary for this report, and continued :] On October 5, 1937, an interlocutory order was made by the Divorce Court in Belgium, appointing the father guardian of the boy pending the trial of the divorce proceedings and giving the custody of the boy to the father. By that order the mother was directed to return the boy to Belgium twenty-four hours after the service of the order. The mother says in her evidence that she was not aware that the proceedings had been started and that the order was not in fact served upon her until December 6, 1938. There was, I think, a suggested service of the order on her by letter to some address in Belgium, but Mr. Andrew Clark, for the father, has very fairly said that he cannot rely upon any service, properly so called, before December, 1938. All that time the boy was in England and his mother sent him to a day school, where he appears to have made satisfactory progress throughout the period from September, 1937, up to to-day. The service of the order on the mother no doubt led up to the settlement made on the infant with a view to making him a ward of Court. On February 11, 1939, there was an order of a Court in Brussels, which I think is referred to as the Correctional Court, imposing a fine upon the mother for her disobedience to the order of October 5, 1937, and sentencing her to fifteen days imprisonment in default of payment of that fine. On March 25, 1939, the mother filed an opposition to the order of February 11, 1939. The proceedings under the opposition were adjourned to July 6, 1939, and the mother says in her affidavit, which was sworn before that date : " I understand that according to Belgian "law it will be possible for me to contest both the said order "of the 5th October, 1937, and the said order of the "11th February, 1939, at the adjourned hearing on the "6th July, 1939. I accordingly intend to submit to the Court "that both the said orders should be reversed and that the "custody of the infant plaintiff should be awarded to me." I have now in evidence what happened on July 6, 1939. The Court which I have called the Correctional Court confirmed its order of February 11, 1939, and that order was made in default of appearance by the mother. There is evidence in the affidavit of Mr. Paternostre, a Belgian lawyer, that the order of February 11, 1939, is not now subject to appeal.

Those being the circumstances leading up to the present application, I am first faced with this problem: From what angle ought I to approach the case, and how far is there any restriction imposed upon the course which I should take by reason of the order of the Divorce Court in Belgium of October 5, 1937, giving custody to the father? Mr. Andrew Clark, for the father, has referred me to the cases of *Nugent* v. *Vetzera* (1) and *Di Savini* v. *Lousada.* (2) By s. 1 of the Guardianship of Infants Act, 1925, it is enacted as follows: [His Lordship read the section and continued :]

I propose first of all to express my views upon what ought to be done with this boy, on the footing that I must consider first the welfare of this boy, and must treat his welfare as being the paramount consideration. I shall deal later with the cases cited by Mr. Andrew Clark, and with the question whether the order of the Belgian Court precludes me from dealing with the matter on this footing. In my view the best thing, from the boy's point of view, is that he should remain with his mother until further order and should continue to attend the school which he is at present attending. I do not propose to say anything about access by the father at the moment. I propose to leave the question of access entirely open. It may be that reasonable arrangements can

(1) L. R. 2 Eq. 704.

(2) 18 W. R. 425.

be come to between the parties, although there are obvious difficulties which may arise.

[His Lordship then stated the reasons which led him to his conclusion as to what was best for the boy and continued :] It appears to me that all the matters to which I have referred, and they are numerous, will be considered in due course by the Belgian Courts, because the husband has launched there divorce proceedings and he is claiming the custody of the child, which has already been given to him, pending the proceedings, by the interlocutory order to which I have referred. The mother states her intention not of contesting the husband's claim to a divorce—she does not appear to desire to resist it—but of contesting his claim to the custody of the child, and it may be, I do not know, that all the allegations which have been made by the wife against the husband will be the subject of review when the divorce and custody proceedings are heard in Belgium. At the moment my feeling is very strong that, even assuming in the father's favour that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England for the time being.

I now turn to the two cases to which I have been referred. In the first case, *Nugent* v. *Vetzera* (1), Page Wood V.-C., as he then was, had to deal with a case in regard to infant wards of this Court who were of Austrian nationality and of whom guardians had been appointed by the Austrian Courts. The last of those appointments was on July 24, 1865, when by a decree of the Austrian Consular Court of the same date, one Vetzera was appointed sole guardian of the children, with a direction that they should be brought up in the religion of their father, and sent as soon as possible to Vienna "in order "to receive their education in that city, the only mode of "awakening and consolidating the sentiments of faithful "Austrian subjects." The mother of these children was an Englishwoman and had apparently been anxious that the children should receive an English education, and with the

(1) L. R. 2 Eq. 704.

MORTON J.

1939

B——'s Settlement, *In re.* B—— *v.* B——.

consent of her husband, who died in 1860, they were all brought up as members of the Church of England. Two of the girls—there were ten children in all—were sent to school in England during the father's lifetime, and in 1861 the eldest boy was sent over to this country: and in 1862, after the marriage of the eldest daughter to Mr. Nugent, a gentleman living in London, two more boys and two of the girls were brought over from Constantinople to England under the care of Countess Gifford, and were being educated in this country, spending their holidays with their married sister Mrs. Nugent. On December 19, 1865, an order was obtained appointing Mr. and Mrs. Nugent and the Countess Gifford guardians of the infant plaintiffs, and giving liberty to serve a copy of the order upon the defendant Albin Vetzera. The defendant Vetzera launched a motion asking: "that an order appointing the plaintiff "Mrs. Nugent and her husband, and the Countess Gifford, as "guardians of the infant plaintiffs during their respective "minorities, might be discharged, and that such guardians "might be ordered to deliver up the infants, who were Austrian "subjects, to the custody of Signor Vetzera, their guardian "duly constituted by the Imperial and Royal (Austrian) "Consular Court at Constantinople." It is to be observed that in that case the guardians constituted in Austria had decided to send certain of these children to be educated in England, and subsequently the order of July 24, 1865, was made and the sole guardian desired that the children should return to Austria. The evidence in the case, on behalf of the plaintiffs, in favour of keeping the children in England was directed, as appears from the report (1) "to the superiority "of an English public school education, and English associa-"tions, over education at Constantinople, or even at Vienna. "Attention was also called in the affidavits to the strongly "expressed and acted upon wish of the mother that the "children should be brought up in England." Under these circumstances the Vice-Chancellor puts the matter in the first paragraph of his judgment as follows: (2) "As regards the "more important matter in this case, a question of very great

(1) L. R. 2 Eq. 704, 708. (2) Ibid. 711, 712.

"importance, but I think really of small difficulty, is raised. "Having regard to the principles of international law, and the "course that all Courts have taken of recognising the proceedings of the regularly constituted tribunals of all civilised "communities, and especially of those in amicable connection "with this country, it is impossible for me entirely to disregard "the appointment of a guardian by an Austrian Court over "these children, who are Austrian subjects, and children of an "Austrian father, merely because those who preceded Signor "Vetzera in his guardianship have taken the course of sending "the children over to this country for the purpose of educating "them, seeing that he is now desirous of revoking that arrange-"ment." Then he goes on to say : "I am now asked in effect to "set aside the order of the Austrian Court . . . ." He goes on to give his reasons, and in one sentence he says :—(1) "It "would be fraught with consequences of very serious difficulty, "and contrary to all principles of right and justice, if this "Court were to hold that when a parent or guardian (for a "guardian stands exactly in the same position as a parent) "in a foreign country avails himself of the opportunity for "education afforded by this country, and sends his children "over here, he must do it at the risk of never being able to "recall them, because this Court might be of opinion that an "English course of education is better than that adopted in "the country to which they belong." There are other passages in the judgment to which my attention has been called, particularly the following : (2) "The same authority which we "claim here on behalf of the Crown as parens patriæ, is claimed "by every other independent state, and should not be inter-"fered with except on some grounds which I do not think it "necessary to specify, guarding myself, however, against "anything like an abdication of the jurisdiction of this Court "to appoint guardians."

In the present case the position is that nearly two years ago, when the child was already in England, an interlocutory order was made by the Divorce Court in Belgium giving the custody of the child to the father. I do not know how far,

(1) L. R. 2 Eq. 704, 712.

(2) Ibid. 714.

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1939

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if at all, the matter was considered on the footing of what was best for the child at that time, or whether it was regarded as a matter of course that the father, being the guardian by the common law of Belgium and the applicant in the divorce proceedings and the only parent in Belgium, should be given the custody. I cannot regard that order as rendering it in any way improper or contrary to the comity of nations if I now consider, when the boy has been in this country for nearly two years, what is in the best interests of the boy. I do not think it would be right for the Court, exercising its jurisdiction over a ward who is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937. I think the present case differs from *Nugent* v. *Vetzera* (1), the case that was before Page Wood V.-C., and it is to be observed that even in that case, and in the special circumstances of that case, the Vice-Chancellor guarded himself against anything like abdication of the control of this Court over its wards. It does not appear what the Vice-Chancellor's view would have been if there had been evidence, for example, that it would be most detrimental to the health and well-being of the children if they were removed from England and sent to Austria. No such consideration arose in the case before him and, as I have said, the evidence appears to have been addressed merely to seeking to establish that an English education was better than an Austrian education, and that the children's mother had wished them to be brought up in England.

In the case of *Di Savini* v. *Lousada* (2) there had been an order by the Pretor's Court of the fourth district of Florence appointing a Dr. Nobili guardian of the infant, subject to the control of a council of tutorship of which the pretor was a member. Dr. Nobili entered into negotiations for the placing of the child in England, and the child was sent to England. The application, which was dealt with by James V.-C., was an application which had been directed to be made by the Italian Court to the Court of Chancery in England for the discharge of an order made in England

(1) L. R. 2 Eq. 704.

(2) 18 W. R. 425.

appointing a certain person guardian instead of Dr. Nobili. That was a case in which the Court, which had appointed the guardian abroad before the child came to this country, was desirous of having carried out the terms upon which the child had been sent to this country. The Vice-Chancellor said (1): " On the lady's death the child being at Florence "was placed under the jurisdiction of the Italian laws, and "in pursuance of an order of the Pretor's Court, a council of "guardians was appointed under judicial supervision. I am "bound to respect that court and council, just as I should "expect an Italian Court to respect my own decrees." He then states the circumstances of the case and goes on: ". . . . very soon after the arrival of the child here, a question "was raised between the Italian and the English guardians. "The Italian guardians did not intend to abdicate in any "way their power. Nothing has arisen to lead this Court to "say, ' we ought not to recognise the authority of the Italian "' Court.' That Court has directed Dr. Nobili to apply to "this Court to alter the circumstances in which the child is "placed. The dissatisfaction has been expressed so early that "I cannot say there has been any laches. I think that I am "bound without exercising any judgment of my own to "recognise their authority." I can well appreciate that in the circumstances of that particular case the Vice-Chancellor thought it right to accede to the application, but I think that at the present time, whatever may have been the position before the Act of 1925, this Court is always bound to exercise a judgment of its own when dealing with the custody of a ward. In my view, under s. 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the

(1) 18 W. R. 425, 426.

Courts of any other country. If there are any observations in the two cases cited which state or imply a contrary view, these observations ought not, in my view, to be followed at the present day.

Apart from this statement of my view, I do not intend to lay down any general rule, on the present application, as to the weight which this Court ought to attach to orders of a foreign Court, in dealing with the custody of a ward who is a foreign national. I think the weight to be attached to such orders might depend upon the circumstances of the particular case which the Court had to decide. In the present case I have considered with care and with respect the order made by the Belgian Court on October 5, 1937, and the consequential order made on February 11, 1939. But I cannot disregard the fact that the order of October 5, 1937, was made nearly two years ago, and I have to deal with the position as it is now. It is true that the order of February 11, 1939, was affirmed in July, 1939, but there does not appear to have been any rehearing of the facts of the case on that occasion.

For the reasons which I have stated, I propose to make no order on paras. 1 and 2 of the applicant's summons. I do not think it is a case in which I should make any order as to costs, nor have I been asked to do so. Under para. 4 of the summons I propose to direct that the infant shall remain in the custody and care of his mother until further order and that he shall continue to attend his present school, but I wish to make it quite clear, and it can be so expressed in the order, that this order is without prejudice to any question as to the father having access to the child.

Solicitors: *Wynn-Baxter & Keeble; Pengelly & Co.*

K. R. A. H.

FARWELL
AND
MORTON
JJ.

1939
Nov. 9.

## *In re* A DEBTOR.

## *Ex parte* DUNN TRUST, LIMITED.

*Bankruptcy—Action in High Court on promissory note—Judgment not satisfied—Leave given in High Court to proceed to enforcement—Bankruptcy petition presented in county court—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1*—Courts (Emergency Powers) Rules,* 1939 (*S. R. & O.*, 1939, *No.* 995/*L.* 14), *r.* 2.

Creditors who had recovered judgment in the High Court before the outbreak of war for the amount due on a promissory note obtained leave in the High Court under the Courts (Emergency Powers) Act, 1939, " to proceed to execution on, or otherwise " to the enforcement of," that judgment :—

*Held*, that they were thereupon entitled to commence bankruptcy proceedings against the debtor in the county court, since they were thereby proceeding " to execution on, or otherwise to "the enforcement of," the judgment within the meaning of s. 1, sub-s. 1, of the Act, and the High Court " by which the judgment "or order had been given or made " having given them leave to do so, r. 2 of the Courts (Emergency Powers) Rules, 1939, was satisfied.

Per Farwell J. When once the leave of the Court has been given, the person obtaining it can take all proper steps to enforce the judgment and is in the same position as he would have been in if the Act had not been passed.

Ex parte application against the refusal of the Registrar of the Oxford County Court to file a petition in bankruptcy.

On June 20, 1939, Dunn Trust, Ld. (hereinafter called "the applicants "), commenced an action in the High Court against the debtor to recover 100*l.* due on a promissory note, together with interest. A summons for judgment under Order XIV. having been issued, the applicants recovered judgment for the amount of the principal, but leave was given to the debtor to defend the action as to the interest. The debtor did not pay the amount of the judgment, and a bankruptcy notice issued on August 16, 1939, was served on him on August 19, 1939. After the outbreak of war the applicants applied in the High Court under the Courts

(Emergency Powers) Act, 1939, s. 1, sub-s. 1 (1), for leave "to proceed to execution on, or otherwise to the enforcement "of," the judgment. On September 23, 1939, Master Moseley

(1) By the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1: "Subject to the provisions of this "section, a person shall not be "entitled, except with the leave "of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any "judgment or order of any court "(whether given or made before "or after the commencement of "this Act) for the payment or "recovery of a sum of money: ". . . ."

By s. 2: "(1.) The appropriate "court for the purposes of any of "the provisions of this Act shall "be such court as may be designated by rules made by the Lord "Chancellor under this Act, and "such rules may designate different courts in relation to different "classes of proceedings. (2.) The "Lord Chancellor may also make "rules prescribing the manner in "which applications under this "Act are to be made, and generally "for regulating the conduct of "proceedings under this Act."

By s. 3: "For the purposes of "this Act . . . . (*b*) a person "entitled to the benefit of a "judgment or order, who issues a "bankruptcy notice or presents a "bankruptcy petition or a winding-up petition founded on the "non-payment of money due "under that judgment or order "shall be deemed to be proceeding "to the enforcement of that judgment or order."

By the Courts (Emergency Powers) Rules, 1939, r. 1: "The "appropriate court for the giving "of the leave required by section 1 "shall be the court prescribed in "rules 2, 3, 4 and 5."

By r. 2: "Under sub-section (1.) "for proceeding to execution of a "judgment or order for the payment or recovery of a sum of "money or for enforcing any such "judgment or order otherwise "than under the Debtors Act, "1869, the appropriate court shall "be the court by which the judgment or order has been given or "made, or in which the judgment "or order is being sought, and for "enforcing any such judgment or "order under the Debtors Act, "1869, the appropriate court shall "be the court in which the enforcement is being sought."

By r. 4: "(2.) Where leave is "required for the purpose of "taking proceedings in a county "court, the application for leave "shall be made in the court in "which the proceedings are to be "taken, and in any other case "where the county court is the "appropriate court, the application for leave shall be made in "the county court for the district "in which the respondent or one "of the respondents resides or "carries on business or the subject-matter of the application is "situate."

"(3.) Where the High Court "and a county court have concurrent jurisdiction under this "Rule, the application shall not be "made to the High Court except "in special circumstances."

"(4.) Where an application "is made to the High Court "and the court or judge is of "opinion that it ought to have "been made to a county court, "the court or judge may order the "matter to be transferred to the "county court."

made an order giving them leave. On November 3, 1939, the applicants presented a bankruptcy petition to the Registrar of the Oxford County Court, who refused to file it on the ground that leave to enforce the judgment had not been obtained in that county court. The applicants now sought the direction of the Court that the petition should be filed by the Registrar.

*Cyril Salmon* for the applicants. The whole matter turns on the Courts (Emergency Powers) Act, 1939, and the Rules made thereunder. The relevant sub-section is s. 1, sub-s. 1, and under r. 2 the appropriate court to give leave to enforce the judgment was the High Court by which the judgment had been given. This is supported by r. 10, sub-r. 1: "Where a judgment or order has been given or made, an "application under sub-section (1.) or sub-section (3.) for leave "to proceed may be made by summons in the proceedings." The Registrar was bound to accept the order of the Master as an order duly made under r. 2. He may have misdirected himself by erroneously reading r. 4 as applicable to this case.

MORTON J. I have been asked by my brother Farwell J. to deliver judgment first in this case. [His Lordship stated the facts, and continued:] The matter turns on the construction of the Courts (Emergency Powers) Act, 1939, and of the Rules made thereunder. [His Lordship read s. 1, sub-ss. 1 and 2, of the Act, and continued:] It is apparent that the relevant sub-section in this case is sub-s. 1. The proviso to that sub-section is immaterial, and I do not think that any one of the other sub-sections is relevant. [His Lordship then read s. 2, sub-ss. 1 and 2, and s. 3 (*b*), and continued:] It seems to me plain that in the present case the applicant is proceeding "to execution on, or otherwise "to the enforcement of, a judgment or order" within the

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By r. 10: "(1.) Where a judgment or order has been given or "made, an application under sub-section (1.) or sub-section (3.) for "leave to proceed may be made "by summons in the proceedings.

"(2.) The summons shall be to "the effect of Form No. 4."

meaning of s. 1, sub-s. 1. Accordingly I must turn to the Courts (Emergency Powers) Rules, 1939, to see which is the appropriate court for the giving of the leave required by s. 1. [His Lordship then read rr. 1 and 2, and continued :] I pause there to observe that under the earlier portion of r. 2 the appropriate court is that " by which the judgment or order "has been given or made." The present case would seem to me to come precisely within that portion of r. 2.

Rule 3 has no application to the present case. [His Lordship then read r. 4, sub-r. 1, and continued :] It is to be observed that this rule is dealing with cases in which it is sought to exercise any remedy referred to in para. (*a*) of s. 1, sub-s. 2, of the Act. [His Lordship then read r. 4, sub-rr. 2, 3 and 4, and continued :] It is suggested by counsel for the applicant that the learned Registrar may have read r. 4, sub-rr. 2, 3 and 4, as being applicable to the present case and that this may have been the reason why he refused to file the petition. However that may be, it seems to me that these sub-rules of r. 4 have no application at all to the present case.

Counsel relied also, and in my view quite rightly, on r. 10. [His Lordship read the rule, and continued :] It seems to me plain that the proceedings referred to in r. 10 are those in which the " judgment or order has been given or made."

The learned Registrar has misconstrued the Act and the Rules and in my opinion this appeal should be allowed.

FARWELL J. I agree entirely with what has been said. I desire to add only this. The intention of the Legislature in passing the Act and sanctioning these Rules was to prevent any person who had obtained a judgment from enforcing it except with the leave of the Court, but when once that leave has been given the person to whom it has been given can take all proper steps to enforce the judgment in any Court he may select and he is in the same position as he would have been if the Act had not been passed.

Whatever may have been the reasons which led the learned Registrar to act as he did, he has misdirected himself, He ought to have filed the petition, and in my judgment this matter must go back to him with the direction to do so.

FARWELL AND MORTON JJ.

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A DEBTOR, *In re.*

DUNN TRUST, LD., *Ex parte.*

Solicitors: *Woolfe & Woolfe.*

F. H. C.

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# URBAN HOUSING COMPANY, LIMITED *v.* OXFORD CITY COUNCIL.

[1938. U. 641.]

*Local government—Streets—Private building estate—Streets on estate joining streets on local authority's estate—Erection of walls across streets at boundary of private estate by owners—Walls demolished by local authority—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 26—*Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *s.* 19 —*Public Health Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 25, *sub-s.* 3.

In 1933 a company purchased from a local authority part of an estate for the purpose of developing it as a private building estate. The plan of the land purchased showed two roads (with sewers beneath them) running across the company's land and connecting with two roads in the local authority's land. The conveyance did not reserve to the local authority a right of way over the two roads in the company's land. In September, 1934, the company informed the local authority that they proposed to retain these two roads as private roads and to build walls across them. After some correspondence the company built two walls across the roads, so preventing access to them from the local authority's land.

On September 20, 1937, the town clerk of the local authority wrote to the company calling upon them to remove the walls and make good the surface of the roads and enclosing a notice purporting to be pursuant to s. 26 of the Public Health Act, 1875. On February 7, 1938, the local authority adopted the Private Streets Works Act, 1892, and shortly afterwards declared the two roads in the company's land to be highways repairable by the inhabitants at large. On June 7, 1938, the local authority's parliamentary committee passed a resolution instructing the city engineer to remove the walls forthwith and they were accordingly demolished.

Bennett J. made a declaration that the company was entitled to re-erect and maintain the two walls:—

*Held,* affirming the decision of Bennett J., (1.) that the walls were not buildings within the meaning of the covenants in the schedule to the conveyance and that no breach of the covenants had been committed by the company in erecting them; (2.) that the erection of the walls was not a breach of the local authority's by-law which provided that new streets should be kept open at one end, and, where practicable, at both ends; (3.) that the local authority should have given the company notice of their intention to demolish the walls and an opportunity of showing cause why such steps should not be taken; (4.) that the local authority did not in fact demolish the walls in exercise of the statutory powers conferred by s. 26 of the Public Health Act, 1875; and (5.) that at the date when the local authority passed the necessary resolution to put the Public Streets Works Act, 1892, into effect, the walls were already in existence, and, accordingly, the physical condition of affairs at that date was such that the powers under s. 19 of that Act could only be applicable to such portion of the company's roads as were not covered by the walls.

APPEAL from Bennett J.

In this action the plaintiffs asked for an injunction to restrain the defendants from interfering with or preventing the plaintiffs from re-erecting certain walls erected by them on lands belonging to them adjoining Wentworth Road and Carlton Road, in the City of Oxford, which walls they alleged had been demolished by the defendants on June 7, 1938. They also claimed a declaration that they were entitled to erect and maintain such walls.

In 1933 the plaintiffs purchased part of a farm, which the defendants had previously acquired for the purpose of developing it as a building estate. This transaction was completed by a conveyance, dated September 19, 1933. The conveyance contained no covenant giving the defendants a right of way over streets on the plaintiffs' estate. Before the conveyance was executed, the plaintiffs, who desired to develop the part of the farm purchased by them, submitted an estate plan to the defendants, and this was approved by the defendants on July 31. The plan showed two roads running across the plaintiffs' estate and connecting with two roads on the defendants' estate. On September 22, 1934, the plaintiffs wrote to the defendants that, acting under pressure brought to bear upon them by their tenants, they proposed to retain their two roads as private roads, and, in order to do so, to build walls across the roads in order to prevent the tenants on the defendants' estate from using the roads on the plaintiffs' estate. Correspondence ensued, and eventually the plaintiffs built two walls seven feet high, completely barring any entrance from the defendants' estate on to the plaintiffs' estate.

On September 20, 1937, the defendants' town clerk wrote to

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the plaintiffs that the defendants had been advised that the plaintiffs' acts constituted a breach of the covenants contained in the conveyance, and also of the defendants' by-laws with respect to new streets and buildings, and that the defendants were further advised that the plaintiffs' acts constituted a breach of the provisions of s. 26 of the Public Health Act, 1875. The letter then called on the plaintiffs to remove the buildings they had erected and to make good the surface of the roads, and a notice pursuant to s. 26 was enclosed. On February 7, 1938, the defendants, by resolution, adopted the Private Street Works Act, 1892, such resolution to come into operation on March 31. On May 16, 1938, the defendants passed a resolution stating that certain streets in the City of Oxford, including the two streets in question, were streets within the meaning of the Private Street Works Act, 1892, and had been sewered, levelled, paved, metalled, flagged, channelled and made good, and that they ought to become highways repairable by the inhabitants, and they declared that under and by virtue of the powers conferred on them by the Act, each of such streets was a highway repairable by the inhabitants at large. On June 7, 1938, the defendants' parliamentary committee passed a resolution to instruct the city engineer to remove forthwith the walls erected by the plaintiffs. On the same day some of the defendants' officers went to the locus in quo and, with a steam-roller belonging to the defendants, demolished the two walls. This was done without the defendants giving the plaintiffs notice that they intended so to do. Subsequently the plaintiffs commenced this action.

Bennett J. made a declaration that the plaintiffs were entitled to erect and maintain the two walls that had been demolished by the defendants.

The defendants appealed. The appeal was heard on October 26, 27 and 30, 1939.

*Charles Harman K.C.* and *Wilfrid Hunt* for the appellants. The resolution of the council on May 16, 1938, making the plaintiffs' two roads highways repairable by the inhabitants at large justified the removal of the walls.

[GODDARD L.J. If the appellants could prove dedication of the roads before the walls were erected, they would be right.]

The result is the same if the walls were wrongly put up and that is so here, as their erection constituted a breach of covenants in the deed of conveyance to the appellants of the land on which the roads were made. No original right of way was reserved over the respondents' two roads, but as soon as they and their continuations on the appellants' land were taken over by the local authority they became highways. The resolution having this effect was passed on the day after the walls were knocked down and the respondents have no right to replace them. Another ground on which the walls were wrongfully erected is that they were erected over sewers. It was a breach of the Public Health Act, 1875, s. 26, to do that, and justifies an order for their removal. The walls were built in breach of covenant, and the appellants were entitled to have them taken down. They were also entitled to act under s. 26 of the Public Health Act, 1875.

[SIR WILFRID GREENE M.R. Taking down the walls by means of a steam-roller was not exercising their rights under s. 26.]

The Private Street Works Act, 1892, ss. 6, 19, give the respondents certain powers.

Bennett J. relied on *Hopkins* v. *Smethwick Local Board of Health* (1) and *Cooper v. Wandsworth District Board of Works.* (2) In *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (3) and *Attorney-General* v. *Hooper* (4) a somewhat different view was taken.

*Erskine Simes* and *C. E. Scholefield* for respondents. All that the respondents are asking is that they are entitled to re-erect walls similar to those pulled down. In *Paddington Corporation* v. *Attorney-General* (5) a screen erected for the purpose of preventing certain houses from acquiring a right of light was held not to be a "building." The Metropolis Local

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(1) (1890) 24 Q. B. D. 712.
(2) (1863) 14 C. B. (N. S.) 180.
(3) (1890) 24 Q. B. D. 703.
(4) [1893] 3 Ch. 483.
(5) [1906] A. C. 1.

Management Act, 1854–5, s. 204, gave the appellants power to pull down any buildings erected over sewers, but these walls were not buildings. Sect. 68 of the Metropolis Local Management Act, 1862, added fence, wall, etc., but the Act of 1875 deals only with buildings. It does not include walls, but if walls can be buildings under the Act, these particular walls were not buildings to which the Act applied. The appellants' right to pull down was under s. 25 of the Public Health Act, 1936, not under s. 26 of the Act of 1875. The notice to be given under that section is a warning notice, and there is no provision for any similar notice in the Act of 1875.

[CLAUSON L.J. Under that Act the appellants had no right to pull down the walls until they had given the respondents notice to pull them down.]

Sect. 25 deals purely with submission of plans, but now the respondents have re-erected the walls in accordance with an order of Bennett J.

[GODDARD L.J. I am not sure that under s. 25 a wall is a building.]

*Slaughter* v. *Sunderland* (*Mayor of*) (1) deals with what is a building for the purposes of local authorities' by-laws.

[CLAUSON L.J. It appears from that case that a wall like those in the present case does not come within the powers of local authorities to deal with.]

SIR WILFRID GREENE M.R. This is an appeal by the Mayor, Aldermen and Citizens of the City of Oxford against an order made by Bennett J. declaring that the respondents, the Urban Housing Company, Ld., were entitled to re-erect and maintain two walls which had been demolished by the appellants. I do not propose to go into the details of the history of this unfortunate controversy; they are fully stated in the judgment of the learned judge. I need only say this, by way of preface to my judgment, that when on September 19, 1933, the appellants, whom I will call the corporation, conveyed to the respondents, whom I will call the company, part of the corporation's building estate, they omitted, whether by accident or by design, to reserve to themselves rights of way over certain roads, the sites of which were indicated on the relevant plans. Their omission to do so has led them to perform a variety of manœuvres in seeking some possible expedient which would enable them to obtain, against the will of the company, the rights for which they had failed to stipulate. The last expedient which commended itself to the corporation consisted of a judicious combination of the provisions of the Private Street Works Act of 1892 and the City's steam-roller. To what extent this miserable performance can be reconciled with the dignity of a great and historic corporation is a question which may well be left to the more sober reflections of the City Fathers. We are not concerned with it.

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(1) (1891) 60 L. J. (M. C.) 91; 55 J. P. 519.

A variety of points were taken, and quite properly taken, by Mr. Harman on behalf of the appellants, in order to persuade us to say that the judgment of the learned judge was wrong. I will deal with those points in what appears to be the most convenient order. The first points relate, and relate only, to the true construction of the conveyance, and there are two of them. The first is based upon the provisions of the conveyance with regard to roads: the other is based on the provisions of the conveyance with regard to buildings. By way of preface, I should say that it is admitted and, indeed, it could not have been otherwise, that the conveyance upon its true construction does not reserve to the corporation any right of way in respect of the roads in question. The object of the arguments based upon the construction of the conveyance is not to obtain what they would be quite insufficient to obtain, a right of way, but to ensure that no obstruction in the shape of a fence or wall, or anything of that kind, should be placed at the company's boundary across these two roads; in other words, it is said that upon its true construction, the conveyance prohibits the company from doing what, in the normal course, a landowner in the company's position might very well wish to do—namely, to fence his own land. It is to prevent the company exercising such a common right that these arguments are brought forward. Be it observed that the arguments, if successful, would lead to the position that the company's boundaries where they coincide with the sites of the roads would perforce be left open, but nobody would be allowed to set foot upon the company's land; neither the corporation nor its tenants would have a right of way, and if anyone set foot across the imaginary dividing line they would be trespassers. Nevertheless, for reasons which will appear, the corporation consider that if they can keep these roads open, unobstructed at the ends, it will put them in a position to exercise some statutory right as the indirect result of which the right of way could be obtained for which they omitted to stipulate, and in the absence of which the purchase price of the land was fixed.

I now turn shortly to the clauses in the schedule upon which reliance is placed. It will be remembered by those who have considered the statement of facts and the judgment of the learned judge that the plan annexed to the conveyance, the estate plan which was agreed in accordance with the conveyance—it was in fact agreed beforehand—and the sewer plan, all show continuous roads, starting at the Banbury Road on the west, running over a portion of land belonging to the corporation and retained by them, over which the company was given a right of way, thence up to the boundary of the land purchased by the company, and from that point continuing into the Cutteslowe Housing Estate, which was in process of development by the corporation. It will also be remembered that in the conveyance the corporation reserved to themselves a right which would enable them to move from the position indicated the portions of the continuing roads shown on the Cutteslowe Estate, so that there would be thereafter no continuation in fact, and if the corporation were minded to exercise that power, the result would be that the roads shown on the plan as running up to and through the company's boundary, would end in culs-de-sac at the eastern boundary of the company's land.

Now the clauses relied upon in relation to roads are clauses 4, 12, 16 and 18 of the schedule, and it is said that those clauses when considered and read in relation to the relevant plans, show that the parties were bargaining on the footing that the roads were through roads. I am not quite sure what that phrase means. If it means that they were to be roads over which there should be mutual or unilateral rights of way, it is incorrect, because there is nothing in the conveyance which gives any such rights. I apprehend, therefore, that all it means is that these clauses on their true construction show that the obligations of the company were to leave what would physically be a road running up to their boundary, and having there a junction with a road running through the corporation's land; in other words, when the roads are spoken of as through roads, that refers merely to their physical layout on the ground. But that they were not intending that that would necessarily be the result is manifest from the fact to which I have already alluded, that the corporation have power so to lay out their estate that that state of affairs will not exist.

Now under clause 4 the company covenants to lay out and sewer all the roads to be constructed within the area of the land conveyed, and then it specifies widths: "The two continuation streets of the width of 40 feet in respect of the "continuation of the said two streets coloured yellow on the "said plan," and all this was to be done in a manner and to the satisfaction in all respects of the vendors as the local authority, and in accordance with the building by-laws as to new streets and the provisions of Public and Local Acts, and the purchasers were to pay the costs. Emphasis is there laid upon the word "continuation" in the phrase "the two continuation streets," but it is clear to my mind that the word "continuation" there is used in reference to the fact that the two streets going across the company's land, which it was purchasing, were continuations not of some roads upon the corporation's housing estate on the east, but of the yellow roads shown on the plan, which were the roads over which, as I have said, the company were given the right of way at the Banbury Road end. However that may be, and giving such effect as can properly be given to the circumstances that when the plans are examined they show that the roads physically are continuing and joining the roads on the corporation's estate to the east, I am quite unable to extract from this clause anything which imposes upon the purchasers the obligation of keeping that part of their estate open, or which prohibits them from fencing in their estate, if they were so minded. The real fact of the matter is that in this clause, and in the other clauses of this conveyance, the point was not properly provided for. If the corporation had wished to prevent the purchasers from fencing their estate and had wished, without reserving a right of way, to compel the purchasers to leave those points unfenced, they should have provided for that, but they did not, and now, not unnaturally, they seek to extract from the language of the deed phrases which will enable them to get something for which they did not expressly provide and the necessity of which they apparently at the time did not contemplate.

There is one point on that clause which I have read, which requires a word of special reference, and that is the provision that the construction of the roads and the other works mentioned are to be in accordance with the building by-laws as to new streets. It is said that under that clause, or indeed without it, there is a by-law under which the company was bound to leave the ends of those two roads open and unobstructed. The by-law in question is No. 10, which provides as follows: "Every person who shall lay out a new street shall "provide that one end at least of such street, and where "practicable both ends, shall be open from the ground "upwards to the full width of such street." If that by-law were one which purported to deny to a landowner, who was minded to lay out a street on his land, the right to maintain a fence at his boundary and so leave the new street in the position of a cul-de-sac, I should be disposed to think, and very strongly disposed to think, that the by-law was completely ultra vires; but in my opinion, as a matter of construction of the by-law, it does not purport to impose any such restriction upon the rights of a landowner. The words "where practicable both "ends," I think, can be construed in such a way as not to involve an interference with such a right, with the result that it could not be said, in a case where the owner of the land wished to maintain a fence in accordance with his ordinary rights, that it was practicable to leave that street open at both ends. That is the case here, and I cannot find in this by-law, either as imported into clause 4 of the schedule, or as standing quite apart from the conveyance, anything which enables the corporation to complain of the erection of those two walls.

Clause 12 provides that " No portion of the land shall be "used as a road or way or as part of a road or way from or to "any land adjoining or adjacent to the said land other than the "roads shown on the said plan without the consent in writing of "the vendors first obtained." That, in my judgment, carries the matter no further, and cannot be construed either alone or in combination with other clauses in the schedule of the plans, as depriving the purchasers of the right to do what they did. Then clause 16 is the clause to which I have referred, under which the corporation were entitled to alter the plotting of any land unsold, and to vary the position of any intended roads leading from the roads to be constructed on the land which the company was acquiring. That again, so far from helping the corporation, appears to me to point in the opposite direction, because in so far as the corporation exercised that right, the alleged scheme of through roads, if ever it existed, would cease to exist and could not thereafter be carried out. Clause 18 uses the phrase "the scheme of roads," and perhaps I should read that clause : "The scheme of roads building lines and other "matters as shown on the said estate plan and the building and "other restrictions imposed upon purchasers shall not be "binding upon the vendors who shall be at liberty to vary or "alter the same from time to time as regards any other portions "of the vendors' adjoining land without reference to the "owners or occupiers of any plot or plots which may have been "previously sold or otherwise disposed of." That again gives a like power to the corporation with regard to altering the sites of intended roads on their retained land as shown on the plans. Emphasis was laid on the phrase, "the scheme of roads," but in my judgment that phrase does not really assist the argument at all. The real fact of the matter is, as I have said, that the conveyance did not provide for an obvious thing for which it could have provided, and it is impossible to spell out of these phrases some restriction upon the ordinary rights of a purchaser in the way suggested.

The other argument was based on the clauses relating to "building," and the clauses relied upon were Nos. 5, 7, 8 and 9. Clause 8 provides that: "The purchasers shall only erect on "the land hereby conveyed detached or semi-detached houses "and two blocks of eight garages each for the use only of "owners or occupiers of houses erected on the said land in "accordance with the estate plan." Clause 6, I should have mentioned, provides that: "No house or other building shall be "erected so that its principal front shall face otherwise than "towards the said roads," and clause 7 provides that: "The "front or flank walls of any house or building to be erected on "any part of the land hereby conveyed shall range or be in line "with the building line or lines." Then comes this provision, which I must read at length: "no building or erection of any "kind (except a fence or other enclosure and a gate or gates) "shall be erected on any part of the said piece or plot of land "which lies between the said building lines and the road or on "the sites of the proposed roads marked on the said estate "plan." Pausing there for a moment, that sentence which I have read bears, on the face of it, the traces of a rather curious origin, because the first part, which refers to "the said piece or "plot of land," and provides that the only thing that can be erected beyond the building line is a fence or other enclosure and a gate or gates, recalls a common type of provision in conveyances of a plot out of a building estate, in respect of which the building line is to be observed, but the power to fence the front garden of the house is reserved. Whether that be the origin of this clause or not, on to it there are grafted words relating to the sites of the proposed roads. It would be tempting, perhaps, if one were tempted to look very carefully for something to help the corporation in view of what it has done, to do violence to this clause and say that the exception for the construction of a fence or other enclosure is confined to what I may call the front garden of the proposed houses and does not extend to the sites of the proposed roads, but I find myself quite unable to do such violence to the language of this sentence. It means, grammatically, as far as I can see, and means quite clearly that the exception with regard to the construction of a fence or other enclosure and a gate or gates, applies not merely to the front gardens of the proposed houses, but applies to the sites of the proposed roads. That being so, the clause in terms permits the erection of a fence or other enclosure on the sites of the proposed roads, and one can see really no reason why that should not be so. Of course, if the corporation had reserved a right of way, it would be impossible to construe it in that way, and some other construction would have to be found, but no rights of way having been reserved, I cannot see any reason why the company should not have been given, in rather clumsy language it is true, the power to build fences or obstructions across the roads if they wished. Now it is said that the phrase "fence or other enclosure" would not include a wall. I am quite unable to take that view, and I need say no more about that. We, therefore, reach the point that a wall, and this wall, was a thing permitted to be put up under clause 7. Clause 8 provides that: "The erection shall not be "commenced of any house or other buildings on any part of the "land hereby conveyed until and then only in accordance with "an estate plan showing the proposed layout and also plans and "drawings of such house or other building showing the intended "elevations and sections and specifications thereof have been "submitted to and approved by the vendors or their surveyor "for the time being the purchasers submitting the said estate "plan and plans elevations sections and specifications as often "as called upon by the vendors estates surveyor so to do until "the same shall be finally approved and signed by the vendors "estates surveyor and if required leaving with him for reference "copies of such approved estate plan plans elevations sections "and specifications and a copy of such drawings has been "deposited by the purchasers with the vendors in respect of "each house or building. (9.) No building shall be erected on "the said piece of land or on any plot forming part thereof "other than a private dwelling-house with suitable offices and "out-buildings and with or without garage accommodation and "the said sixteen garages."

The first point is whether or not this wall is a building within the meaning of the clauses which I have read. In my opinion, it is not a building within the meaning of those clauses at all. When those clauses are examined and the phrase "building" is looked at in its context, it appears to me to relate to matters in respect of which you would expect to find a requirement for the submission and approval of plans, a thing for which, in the case of a boundary fence or boundary wall, you would not expect to find a provision. I am confirmed in that view by the circumstance that in the clause in which reference is made to a fence or other enclosure the phrase is, "no building or erection." Accordingly, the parties here are using the phrase "an erection" as meaning something which is not necessarily a building, and into that category they appear to place such things as fences or other enclosures, which indeed strikes one as being in accordance with common sense. I therefore take the view that there was no obligation to submit plans, and that is really the point of the argument; once it is held that this is a fence or other enclosure. The point of the argument is that before these walls were erected plans should have been submitted under clause 8. Then it is said: No plans having been submitted, the walls were built in breach of covenant; they were wrongfully there, and therefore their presence must be disregarded, and they can be removed by means of the City's steam-roller. It is perhaps desirable to state for the information of the appellants, that the removal by force of something erected in breach of a covenant is not a thing which the Law of England permits. This is not the case of the abatement of a nuisance, and even if the argument were right, the only effect would be that the walls had been erected in breach of covenant. The idea that persons, whether local authorities or others, are entitled to secure the benefits of covenants into which they have entered by taking forceful means is one which need not be further commented upon by me. My own opinion is, as I have said, that these are not buildings, but even if they were, the conduct of the appellants in waiting for three years or more after the erection of these walls without suggesting at any time, either by correspondence or in their defence, that the vice of them lay in the failure to submit plans, makes it impossible for them now to turn round and say: "We are entitled to call for the "removal of these walls upon the ground that plans were not "submitted or approved." In my opinion they could not in any event be permitted to take up that attitude at this stage, and on that ground, as well as on the construction of the word "building," I am of opinion that this branch of the argument has no solid foundation.

I now come to the other matters which were urged upon us. First of all, it was said that these walls were things which had been erected in contravention of s. 26 of the Public Health Act, 1875, which was in force when they were erected. That section provided that: "Any person who in any urban district, "without the written consent of the urban authority—(1.) "Causes any building to be newly erected over any sewer of the "urban authority; or (2.) Causes any vault arch or cellar to "be newly built or constructed under the carriageway of any "street, shall forfeit to the urban authority the sum of five "pounds and a further sum of forty shillings for every day "during which the offence is continued after written notice "in this behalf from the urban authority," and then it says: "and the urban authority may cause any building vault arch "or cellar erected or constructed in contravention of this "section to be altered pulled down or otherwise dealt with as "they may think fit," and then they may recover expenses. Now the history of the appearance of that section on the scene is to be found in the correspondence and certain minutes, and it is desirable that I should refer to them. On September 20, 1937, the town clerk wrote to the company, asserting that the acts of the company in erecting the two walls constituted, firstly, a breach of the covenants in the conveyance, and secondly, of the by-laws, namely by-law 10, which is the one to which I referred, and thirdly, he said: "The Council are "further advised that your acts constitute a breach of the "provisions of Section 26 of the Public Health Act, 1875." "Under these circumstances," the letter continues, "the "Council have instructed me to call upon you to remove the "buildings you have erected and to make good the surface of "the roads upon which the same were erected within 21 days "from the date hereof failing which the Council have authorised "me to take all necessary steps to secure their removal and such "reinstatement at the earliest possible moment." Then a notice was enclosed pursuant to the provisions of s. 26. The notice was the notice which s. 26 contemplates, which is to cause the running of the fine, and that was the only matter to which it related. It was said that the letter, from which I have read the relevant passage, was something more, namely, a notice by the corporation of its intention to exercise the power given by s. 26 to remove the walls. In my opinion, the letter is nothing of the kind. It is to be observed that the writer of the letter is the town clerk, and he informs the recipient that the council had authorized him to take all necessary steps to secure their removal, that is, the removal of the walls. I apprehend that even in the corporation of the City of Oxford, the task of physically removing obstructions of this kind is not committed to the town clerk ; the proper person to pull down buildings, if buildings have to be pulled down, would be the city engineer or somebody of that character, and nobody receiving an intimation from the town clerk stating that he, the town clerk, had been authorized to take the necessary steps, would for one moment imagine that that referred to anything more than the sort of steps which town clerks are commonly authorized to take, including, of course, the institution of legal proceedings. I therefore find it quite impossible to construe this letter as bringing to the mind of the recipient any idea that the corporation were intending to exercise their powers under s. 26 without more ado. I am confirmed in that construction of the letter when I find that the resolution in pursuance to which it was sent, namely, a resolution adopted by the council from the parliamentary committee on September 20, 1937, provides that the company be called upon to remove the walls, which are there described as " buildings," and "in default of com-"pliance . . . . the town clerk be authorised to commence and "prosecute . . . . proceedings," which are there specified, and, after stating the matters which the council desire to have submitted to the decision of the Courts, it ended up by saying : "That the Town Clerk be further authorised to take such steps "under such respective sections as he may be advised." It is perfectly clear from that, that at that time the council were not contemplating pulling down the walls without having recourse to the Courts and having their rights in this dispute settled in a proper way. The importance of what I have been saying is its bearing upon the argument that under s. 26 what the corporation have done was justifiable, and in support of that argument reference was made, and necessarily made, to a matter which would destroy its force, namely, the principle that a local authority exercising such a power of demolition as this, in coming to its decision to demolish, and thereby conferring upon itself the statutory power to demolish, is acting in a quasi-judicial capacity and must give the person concerned either a notice that they intend to take this matter into their consideration with a view to coming to a decision, or, if they have come to a decision, that they propose to act upon it, and give him an opportunity of showing cause why such steps should not be taken. That is a matter which has often come before the Courts. I need not do more than refer to one case in which the principle is examined and stated, the case of *Hopkins* v. *Smethwick Local Board of Health*. (1) An attempt was made by Mr. Harman to limit the application of that most salutary principle to cases where the building which it is sought to demolish has been erected in contravention merely of a by-law. I am unable to place any such limitation upon that doctrine. It is to be observed that the power to demolish, in this case, as in the other cases which are relevant upon this matter, is a power contained in the statute itself. It was said that assuming that this principle applied to the present case, a sufficient notice to satisfy had been given, and that notice was contained in the letter from the town clerk, to which I have alluded. I have explained why in my opinion the letter of the town clerk would not have operated as a sufficient notice to satisfy the principle of those authorities, and accordingly that point, in my opinion, is a bad one.

Sect. 26 of the Public Health Act, 1875, was repealed by the Public Health Act of 1936, so far as it deals with a building, and certain other provisions take its place. I shall have to say a word about those provisions when I come to mention the proper form of order of this Court. For the moment all I need say with regard to s. 26 is, that if it had been material for the purpose of settling the form of order, or otherwise for the purposes of this case, to decide whether or not these particular walls were buildings within the meaning of s. 26 of the Public Health Act, 1875, I should have been disposed to take the view that they were, seeing that although it is not suggested the weight of these walls can injure the sewers, nevertheless there must be, on the face of it, some slight interference, or might be some slight interference owing to their presence, with the facility of repairing or re-laying the sewers. However, as will appear, I do not think the order made by Bennett J. requires, in view of what has happened, any modification at all. That disposes, I think, of the arguments based on s. 26 of the Public Health Act. But there is another answer which appears to me equally conclusive. The reliance placed upon the Public Health Act, 1875, s. 26, is in my judgment quite misplaced for what is perhaps a more fundamental reason, which goes to the root of the whole argument, and that is this, that the pulling down of these walls was quite clearly not carried out in exercise or in purported exercise of the powers conferred by s. 26 at all. It is perfectly obvious that the reason why these walls were pulled down when they were pulled down had nothing to do with s. 26. In deciding to pull them down at the time that they did pull them down, the corporation or its committee did not take into consideration the provisions of s. 26 at all; they pulled down these walls in order to secure that that portion of the company's boundary should remain open and unfenced, and they did not pull down the walls in exercise of the statutory power conferred by s. 26. It only requires to glance at three of the minutes in order to see that that is incontestably so. The parliamentary committee, on May 9, 1938, resolved to "ask the "council at the ordinary meeting of the council to be held on "the 20th June next so ratify any action taken by or instruc-"tions given by the committee at its meeting on the 7th June "next, and that meanwhile any risk involved be accepted." It is to be noted that here is the parliamentary committee, having no authority to take action themselves, meeting on

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(1) 24 Q. B. D. 712.

May 9, contemplating that at its own meeting on June 7 it will be coming to some decision, or will be giving some instructions, which will involve some risk, and proposing at the council meeting on June 20 to have that decision of theirs and that action of theirs ratified by the council after it had taken place. On June 7 the parliamentary committee met again and they passed a resolution that "the city engineer"—not the town clerk, be it observed, in reference to the point which I mentioned some time ago—"be and is hereby instructed to remove "forthwith the walls." It was proposed that the chief constable should provide police assistance in this precious affair, but that was not thought necessary and accordingly it was not made part of the resolution. It was further resolved "that the "council be recommended to ratify the above instructions and "action taken by the committee and to indemnify the members "of the committee and the officers and workmen of the corporation against all actions, proceedings, claims, damages, "costs and expenses arising out of the removal of the walls." On June 7, the walls were removed. They were removed under the resolutions of a committee which had no authority to take any such action and in the expectation that thirteen days later, at its meeting, the council would ratify what they had done. To suggest that this performance was in execution of the powers conferred by s. 26 of the Public Health Act, 1875, is, to my mind, farcical, and that by itself is sufficient to get rid of any points based on that section.

Now, the last point taken is one depending on the Private Street Works Act of 1892. Sect. 19 of that Act provides: "Whenever all or any of the private street works in this Act "mentioned have been executed in a street or part of a street, "and the urban authority are of opinion that such street or "part of a street ought to become a highway repairable by the "inhabitants at large, they may by notice to be fixed up in such "street or part of a street declare the whole of such street or "part of a street to be highway repairable by the inhabitants "at large, and thereupon such street or part of a street as "defined in the notice shall become a highway repairable by "the inhabitants at large." Now the two streets in question

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upon the company's land were streets upon which private street works within the meaning of the Act had been executed, and it was within the power of the corporation which had adopted the Act to put s. 19 into operation with regard to the streets in question. But it is to be observed that at the date when they passed the necessary resolution to put s. 19 into effect there were in existence upon these two streets the physical obstructions of the walls and, accordingly, the physical condition of affairs at that date was that the powers under s. 19 could only be applicable to such portion of the company's roads as were not covered by walls. That is, to my mind, incontestable. Sect. 19 empowers local authorities to make streets repairable by the inhabitants at large; it does not extend to making the site on which a wall stands a highway repairable by the inhabitants at large, and the local authority cannot by this section take what is physically a cul-de-sac and remove the boundary wall, thereby throwing the street in question into connection with some other street at the other side of the wall. That, I should have thought, was quite clear on the reading of the section. But it is said that if the two walls were not lawfully in position and had no right to be there, the corporation was entitled to treat them as mere obstructions to the road, they could disregard them and, having passed the necessary resolution, proceed to their demolition, and that, as I have said, was apparently the technique which they finally decided to adopt. The whole basis of the argument depends on the proposition that these walls were not rightfully there, and in reliance on that proposition it is said, and repeated here, that they were not rightfully there because they were there in breach of covenant. In my opinion, that is not so, for the reasons which I have already given. Even if it had been so, the method adopted by the corporation would have been quite illegitimate. The resolution purporting to put this section into operation would, in my opinion, even if these walls were there in breach of covenant, have been inoperative. The proper course, if the corporation had been right upon that point, would have been to secure the removal of the walls by proper procedure, and then proceed to put s. 19 into operation. However, that is by the way. The real and substantial reason is that these walls were not erected in breach of covenant at all. They were not erected in breach of the by-law, as I have said, and they were not erected in violation of the provisions in s. 26, unless it be that they were buildings within the meaning of that section, and even if that had been so—and I will assume for this purpose that it was so—the corporation could not by pulling them down under that section and then calling in aid s. 19 of the Private Street Works Act, give themselves the right to require that these roads should be left open for ever. The most that they could have done under s. 26 would have been to produce a state of affairs in which the right of the company to erect a fence or other obstruction, or a wall at that point, would be limited so as not to obstruct access to the sewer or impose a weight upon it, a thing which could quite easily have been done, at the same time preserving the rights of the company to keep its boundary properly and satisfactorily closed. Having regard to the fact that that was all that s. 26 of the Act of 1875 could ever have enabled them to accomplish, it is quite manifest that to try and treat the whole road, including the site of the wall, as being an open street within the meaning of s. 19 must be ill-founded. Accordingly, in my opinion, the argument based on the Private Street Works Act fails.

Now the order made by Bennett J. was one under which it was declared that the company was entitled to re-erect the walls as they had been before they were pulled down. It is to be noticed that s. 26 of the Public Health Act, 1875, is repealed by the Public Health Act of 1936. That Act came into operation, I think, on October 1, 1937, and under s. 25 of that Act the law is modified. It is provided that in cases where plans of buildings, or extensions of buildings, require the submission of plans in accordance with building by-laws, then the authority is entitled to reject the plans if the building or extension goes over a sewer. Sub-s. 3 provides for the case of a building which had been erected over a sewer without the consent required by s. 26 of the Act of 1875, and enables the local authority to serve notice to pull down, and the provisions of the Act in relation to the service of notices and

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appeals, and so forth, would apply to any such notice. The walls were pulled down after this Act came into operation, but we are told that now they have been rebuilt in their previous form, in accordance with the declaration of Bennett J. The question as to the applicability, in those circumstances, of s. 25, sub-s. 3, might have been an interesting one and might have required discussion. With reference to the date of the pulling down of the walls, I can reinforce the argument as to the absence of any intention to pull down under the Public Health Act by pointing out that no attempt was made to serve any notice, such as would have been required under sub-s. 3 of s. 25 of the Act of 1936. However, that is in parenthesis. The walls have now been rebuilt. At the time that the learned judge's order was made declaring the right to rebuild them, no point was taken on behalf of the corporation that in view of s. 25 of the Act of 1936 plans would require to be deposited. This being so, in my opinion the learned judge was right in not imposing any limitation in the order referring to s. 25 of the Public Health Act, 1936. If the corporation had wished to take the point that the Court ought not to declare a right to rebuild the walls without saving the rights of the corporation under the section, the corporation could have taken that point then and there, and it would have been a matter for argument in the first place as to whether or not these walls were buildings or extensions of buildings in respect of which plans would require to be deposited in accordance with the local by-laws. No such suggestion was made and, in my opinion, in the light of that, it was right to assume, and I propose to assume, that the walls in question could not be described as buildings of that character, and that accordingly there is no objection under s. 25 to their erection or their continuing existence. That being so, I do not see any necessity to do that which at one time it appeared we might have to do, impose some qualification on the order of the learned judge.

The result is that the appeal fails and must be dismissed with costs.

CLAUSON L.J. I agree, and I do not find it necessary to add anything.

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GODDARD L.J. I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co., for the Town Clerk, Oxford; Hancock & Scott.*

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## *In re* WIMBUSH.

## RICHARDS *v.* WIMBUSH AND OTHERS.

[1939. W. 365.]

*Company—Shares—Sale apart from Stock Exchange rules—Dividends—No apportionment.*

In a sale by private bargain (not governed by Stock Exchange rules as to sale cum dividend) of shares, between days on which dividends are declared, the purchaser buys the shares with all the rights which they confer in respect of the company's capital and in respect of profits up to the date of sale: *Black* v. *Homersham* (1878) 4 Ex. D. 24.

Thus, the dividend payable on the declaration next following such a sale is not apportionable, and goes entirely to the purchaser.

ADJOURNED SUMMONS.

By his will dated October 30, 1933, Ambrose Durrant Wimbush (hereinafter called "the testator") directed his trustees to offer his ordinary shares in a company to his son Reginald Stanley Wimbush (hereinafter called "Reginald") at an agreed price not to exceed 1*l.* 10*s.* per share, the offer to be made within one month, and to be accepted by Reginald within six months, of the testator's death, and the purchase-money to be paid by Reginald within twelve months of acceptance. By a codicil dated June 6, 1934, the testator, revising those provisions, directed the trustees, first, within one month of his death to offer 30,000*l.* of the shares to Reginald at an agreed price not to exceed 1*l.* 5*s.* per share. The codicil proceeded, in cl. 2: " . . . . my said son shall "have three calendar months within which to exercise such "option to purchase . . . . and if he . . . . shall exercise "such option . . . . the purchase money . . . . shall be paid "at such time as my son desires (but not later than three "years of [sic] such option being exercised) in which case it "shall be paid by six equal half-yearly payments . . . . and "upon my said son paying one-sixth part of the said purchase-"money my trustees shall assign to him one-sixth part of the "shares so purchased, and until such shares shall be so assigned "my trustee shall be entitled to all the dividends declared by "the company upon such shares together with interest at five "per cent. per annum from the date of any accrued dividend "until the actual payment of the said purchase-money."

The testator died on June 24, 1935, being then the registered holder of 70,001 ordinary shares in the company. On September 24, 1935, the executors sold to Reginald 30,000 of the shares, at 1*l*. 5*s*. a share, for 37,500*l*. On October 8, 1935, they sold 5000 more to him at the same price for 6250*l*., on his undertaking, should the Inland Revenue authorities not accept that amount for probate purposes, to pay whatever sum should be ultimately agreed for those purposes, up to 1*l*. 10*s*. per share. Ultimately a value of 1*l*. 7*s*. 8*d*. per share was agreed with the Inland Revenue authorities, so that a further sum of 666*l*. 13*s*. 4*d*. became payable by him.

For the year ending December 31, 1934, the company declared, on May 15, 1935, a dividend on its ordinary share capital of 15 per cent., less tax; for that ending December 31, 1935, it declared, on April 15, 1936, one of 15 per cent. and a bonus of 2½ per cent., less tax; for that ending December 31, 1936, it declared, on April 14, 1937, one of 15 per cent. and a bonus of 5 per cent., less tax; and for that ending December 31, 1937, it declared, on April 14, 1938, one of 15 per cent. and a bonus of 5 per cent., less tax. The dividend declared in May, 1935, was received by the testator during his lifetime. The others were (so far as concerned the executors and Reginald) received and retained by the persons who were, at the respective dates of declaration, the registered holders of the respective shares in respect of which the said dividends were respectively declared.

On April 16, 1938, the executors sold to Reginald a further 650 shares at 1*l*. 10*s*. per share, and on September 14, 1938, a further 750 at the same price.

By this summons, taken out on February 2, 1939, one of the executors asked (inter alia) whether the dividends paid by the company on the 30,000 shares and on the 5000 shares in respect of the year from January 1 to December 31, 1935, and on the 650 shares and the 750 shares in respect of the year from January 1 to December 31, 1938, were, as at the respective

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dates on which the shares were transferred to Reginald properly apportionable between him and the executors under and by virtue of the provisions of the Apportionment Act, 1870.

*Raymond Jennings* for the executor.

*Hon. C. R. R. Romer* and *Roger Turnbull* for the residuary legatees. The Apportionment Act, 1870, applied to sales of shares. In *Black* v. *Homersham* (1) shares were sold by auction, and a deposit was paid, on August 1. In accordance with the conditions of sale, completion took place on August 29. The conditions said nothing about dividends, and a dividend declared, on August 24, in respect of a period preceding the sale, was held to belong to the purchaser. If the argument for Reginald Wimbush is right, on a sale on April 14, 1936 (the day before dividend is declared), he would be entitled to the whole of the dividend declared on April 15, 1936, in respect of 1935, and to the whole of that later declared in respect of 1936. All that the trustees would get would be interest at 5 per cent. in respect of the period from January 1 to April 14, 1936, and that would be a most unsatisfactory compensation.

Where the estate cannot exact from the donee of the option more than a given sum there is no freedom of contract, subject to this, that if, at the time of the exercise of an option, the then value of the shares was much less than the option price, then there would be freedom of contract. The fact that the trustees were hampered, in a way in which ordinary shareholders are not hampered, in the fixing of price brings the matter outside the ordinary practice. Therefore there is no reason why the Apportionment Act should not apply unless it is displaced by the terms of the will, or by express agreement to the contrary between the trustees and Mr. Wimbush. There is no such agreement, and prima facie the Act applies. In order to displace it, a sufficient provision in the will must be found. The point of law is whether the Act applies, that of construction whether there is anything in the will sufficient to

(1) 4 Ex. D. 24.

displace it. The Act applies to the dividend, declared on April 15, 1936, in respect of the year ending December 31, 1935. Reginald must pay the rest of that dividend to the executors, after retaining for himself the part of it attributable to the period from September 24 to December 31, 1935. It is true that the Act could not apply to a sale taking place between January 1 in any year and the date of declaration of dividend, but it does apply to a sale between the date of declaration in any year and December 31 in the same year.

*Harold Christie K.C.* and *W. J. C. Tonge* for Reginald. The Apportionment Act has no application whatever to a case of this sort: and, whatever view the Court may take about that, the testator has made definite provision in the will—namely, the provision as to the trustees being entitled to dividend with interest from the date of any accrued dividend until the purchase money is paid. The real question for the Court is whether this is in substance a specific legacy of the shares or a sale. *Given* v. *Massey* (1) shows that Reginald was not a legatee of those shares. It was approved and followed by Warrington J. in *In re Wilson.* (2) Also, *In re Kidner* (3) is a direct decision on the point.

*Hon. C. R. R. Romer K.C.* and *Roger Turnbull* in reply on the cases. The words of the Act apply to such a case as this, subject, of course, to the words of Eve J. in *In re Kidner.* (3) It is contended, not that Reginald is a legatee of the shares, but that he is entitled to buy them at a certain price. See also *In re Wilson* (2) where Warrington J. quoted the words of Porter M.R. in *Given* v. *Massey* (4): "And I may observe "in passing that the idea of bounty would be entirely frustrated "by a construction which would subject Loughrey" (a plaintiff) "to a burthen in respect of incumbrances which "might render the bargain a losing one on his part." That is the ratio decidendi of both those cases. It has no conceivable application to this case. Reginald cannot lose on this bargain. *In re Kidner* (3) does not lay down any new principle of law.

(1) (1892) 31 L. R. Ir. 126.
(2) [1908] 1 Ch. 839, 842.
(3) [1929] 2 Ch. 121.
(4) 31 L. R. Ir. 130.

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WIMBUSH, *In re.*
RICHARDS *v.* WIMBUSH.

MORTON J. This case came before me last sittings and as I stated the facts in my judgment on that occasion I need not restate them now. The case comes before me again in the following circumstances: After I had answered question 1 (*a*) and (*b*) and questions 2 and 3 in favour of the defendant Reginald Stanley Wimbush, Mr. Romer, for the other defendants, intimated that he desired to argue a further question as to the apportionment of dividends. I gave leave to amend the originating summons for this purpose. The amendment has now been made and I am desired to answer the new question 4, which is as follows: [His Lordship stated the question and continued:] One further affidavit has been filed since the last hearing; it is an affidavit by the defendant Reginald Stanley Wimbush, to whom I shall refer hereafter as Reginald. In para. 2 he describes the circumstances under which his first purchase of 30,000 shares in A. D. Wimbush & Son, Ld., was carried out. He says: "In the case of the "first purchase of 30,000 shares completed on the 24th day of "September, 1935, a letter was handed to me signed by the "plaintiff, on behalf of the testator's executors, offering me "the said holding of shares in accordance with the terms of "the testator's codicil." Then he exhibits a copy of the letter. It is dated July 8, 1935, and it says: "Dear Sir, in "accordance with the first clause of the codicil to your late "father's will dated June 6, 1934, I hereby offer to you 30,000 "shares in A. D. Wimbush & Son, Ld., at 1*l.* 5*s.* per share "and I shall be glad to receive your written acceptance of "this offer in accordance with clause 2 of such codicil within "the next three calendar months." That is signed by Mr. Richards, one of the executors, "for self and co-executors." Then the affidavit proceeds in paragraph 3 as follows: "I never, "in fact, accepted the said offer in writing; but, I verbally "accepted the same and the sale was duly completed on the "said 24th day of September, 1935, as mentioned in paragraph 9 "of the affidavit of the plaintiff filed in support of the originat-"ing summons on the 1st day of March, 1939." The codicil in fact provides for written acceptance but no point is taken on this as the sale has been actually completed. Paragraph 4 of the affidavit is: "With regard to the other purchase of "shares referred to in the amended originating summons no "offers were made to me in writing, but in each case the "holdings were verbally offered and purchase money was paid "and the shares transferred upon the dates and in the manner "mentioned in paragraphs 10, 11 and 12 of the plaintiff's "said affidavit." That is to say, referring for the moment to the plaintiff's affidavit, 5000 further shares were sold to Reginald on October 8, 1935, and, in the events which happened, the price payable by Reginald was 1*l.* 7*s.* 8*d.* That is the only sale which was made at less than the maximum price specified in the codicil which was, in the case of these shares, 1*l.* 10*s.* per share. As regards the 650 shares they were sold and transferred on April 16, 1938, at the price of 1*l.* 10*s.*, which was the maximum price under the codicil, and 750 further shares were sold on September 14, 1938, at the same price. The last paragraph of the defendant Reginald's affidavit is as follows: "No question of the apportionment "of the dividends on the said holdings of shares or on any of "them was even raised"—it is suggested that the word "even" should be "ever" but I do not think it makes any difference—"by myself or my co-executors in regard to any "of the said purchases and the point, so far as I am aware, was "never present to any of our minds." The result of this evidence is that there were two sales to Reginald in 1935, after the dividend for the year ending December 31, 1934, had been declared, and there were two further sales of shares to Reginald in 1938, after the dividend for the year ending December 31, 1937, had been declared. All of these sales were made at the maximum price fixed by the codicil except, as I have said, the sale of 5000 shares on October 8, 1935. I am satisfied that all those four sales stand on the same footing, in this sense, that there must either be an apportionment of dividends in the case of every one of these sales or there must be no apportionment in the case of any of them. Counsel did not suggest the contrary in argument.

For the sake of simplicity I propose to take the case of the sale of 30,000 shares to Reginald on September 24, 1935.

Mr. Romer and Mr. Turnbull, on behalf of the residuary legatees, argue that the Apportionment Act, 1870, applies to the dividend which was declared on April 15, 1936, in respect of the financial year ending December 31, 1935. They say that the only portion of this dividend which can be retained by Reginald is the portion which is attributable to the period from September 24, 1935, to December 31, 1935, and that the rest of that dividend must be repaid by Reginald to the vendors. I think it is clear that Reginald acquired these shares as a purchaser and not as a legatee. In order to arrive at a conclusion as to whether Reginald's purchase gave rise to any apportionment of dividend I think it is helpful to consider what would have been the position if Reginald had not exercised his option to purchase the first 30,000 shares and the trustees had sold them on September 24, 1935, in exercise of the trust for sale, to A. B., a stranger. I shall assume that the sale was one by private bargain, not governed by any Stock Exchange rules as to when a sale is or is not to be deemed to be a sale cum dividend. I shall also assume that when the bargain was struck—to quote with necessary adaptations paragraph 5 of Reginald's affidavit—"No question "of the apportionment of the dividends on the shares was "raised by the trustees or by A. B. and this point was never "present to the mind of any party to the transaction." Putting the matter in its simplest form, I assume that the trustees say to A. B., on September 24, 1935, "We offer you 30,000 "shares in A. D. Wimbush & Son, Ld., at the price of *x*l. per "share" and A. B. replies: "I accept your offer." Under these circumstances is there any apportionment of dividends or is there not? Would the trustees have been entitled to say to A. B., when the dividend in respect of the year 1935 was declared on April 15, 1936: "As soon as you receive "that dividend you must pay to us an apportioned part "thereof in respect of the period from January 1 to September 24, "1935"? In my judgment they would not have been so entitled. The bargain under the circumstances which I have described is as follows: The trustees agree to sell, and A. B. agrees to buy, at the price of *x*l., 30,000 shares in A. D.

Wimbush & Son, Ld. What the purchaser agrees to buy is the shares with all the rights which these shares confer in respect of the capital of the company and in respect of the profit earned up to the date of the sale. This is well illustrated by the case of *Black* v. *Homersham.* (1) The contract is, in my view, one which precludes any claim by the trustees to any part of the dividend subsequently declared in respect of the year ending December 31, 1935. The purchaser has bought the tree, and with it the fruits that are ripening on the tree. I see no reason why different principles should apply to a sale by the trustees to Reginald under the provisions of the codicil. True, the trustees were not left entirely free to make the best possible bargain with Reginald; they were bound to offer the shares first to him, and they could not demand more than 1*l.* 5*s.* per share. I am dealing still with the first 30,000 shares. The sale was, however, a sale of the shares, and I can see nothing in the provisions as to price which could deprive Reginald of rights which would ordinarily vest in a purchaser of the shares.

Turning to the other provisions in cl. 2 of the codicil I can find nothing which indicates that the testator intended the dividends to be apportioned. On the contrary, he says: "Until such shares shall be so assigned my trustees shall be "entitled to all the dividends declared by the company upon "such shares." The provision which I have just read seems to me to indicate that after the shares have been assigned the trustees are not to be entitled to any of the dividends declared upon the shares.

Now I come to the curious provision: "together with "interest at 5 per cent. per annum from the date of any "accrued dividend until the actual payment of the said purchase "money." I have construed the phrase "accrued dividend" in the judgment which I delivered last sittings. It is a strange fact that each of the contending parties relies upon this provision as supporting his argument. Let me first examine the position, assuming that Mr. Romer and Mr. Turnbull are right and that the testator intended the Apportionment Act to

(1) 4 Ex. D. 24.

apply. Suppose that the trustees sold on the day before the declaration of the dividend; that is, on April 14, 1936. Under these circumstances, under the Apportionment Act, when Reginald received the dividend declared on April 15, 1936, he would have to account to the trustees for the whole of that dividend, since it was declared in respect of the year 1935. Similarly, when Reginald in 1937 received the dividend in respect of the year 1936, he would have to account to the trustees for an apportioned part of that dividend in respect of the period from January 1, 1936, to April 14, 1936. Further, under the provision which I have just read, Reginald would also have to pay interest at 5 per cent. on his purchase money in respect of the same period. Mr. Romer, realizing the difficulties of that situation, conceded—and in my view rightly conceded—that if a sale were to take place between January 1 in any year and the date on which the dividend was declared, the Apportionment Act could not apply. But he says that the Apportionment Act does apply in the case of a sale which takes place between the date of the declaration of the dividend and December 31 of the same year. I cannot believe that the testator intended to draw this arbitrary and capricious distinction. If he intended apportionment to apply at all, I cannot see why it should not have applied equally whether the sale took place, in the case I have taken as an illustration, on April 14, 1936, or on April 16, 1936. In either event there would be a proper apportionment of the dividend. The whole of the dividend for 1935 would belong to the trustees and there would be an apportionment of the dividend for 1936 up to the date of sale. There seems to be no good reason for drawing this distinction, if Mr. Romer's argument is right and the Apportionment Act applies.

I now proceed to assume for the moment that Mr. Christie and Mr. Tonge's argument for Reginald is correct. The position then is not entirely a happy one, under the provision as to payment of interest. The position then would be as follows: If the trustees sold on April 14, 1936, the day before the dividend was declared, according to Mr. Christie's argument, Reginald would be entitled to the whole of the dividend declared on April 15, 1936, in respect of the year 1935, and Reginald would also be entitled to the whole of the dividend subsequently declared in respect of the year 1936, and the only compensation which the trustees would get would be interest at 5 per cent. in respect of the period from January 1, 1936, to April 14, 1936. That, as Mr. Romer has pointed out, is a somewhat inadequate compensation. In my judgment, the provision which I am now discussing is a curious provision which does not fit very well with either construction, and I do not think that either side can rely upon it very strongly in support of its argument. I base my decision on the reasons which I have already stated, which seem to me sufficient to exclude any apportionment in this case.

For these reasons I propose to answer question 4 of the amended originating summons in the negative so far as regards the 30,000 shares. The same reasoning applies, in my view, to the other three blocks of shares mentioned in this question, and that appears to dispose of all the matters which are left for my decision.

Solicitors: *Taylor, Jelf & Co., for Perry, Son & Richards, Birmingham; Theodore Goddard & Co.*

K. R. A. H.

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Nov. 8, 9.

## *In re* MORRISON'S WILL TRUSTS.

## WALSINGHAM *v.* BLATHWAYT.

[1938. M. 2305.]

*Will—Gift to class—Forfeiture of interest if Roman Catholic—Divisibility of clause—Rule against perpetuities.*

A will contained a provision that if any legatee became a Roman Catholic or married a Roman Catholic the legacy should be forfeited and that, in the case of a life interest, the fund out of which such life interest was payable should fall into the residuary estate of the testatrix.

The testatrix directed that a legacy of 5000*l.* should be held in trust for A. for life and after A.'s death (subject to a power of appointment among her issue, and also if A. should not survive the testatrix) for A.'s children in equal shares. A. and one of her children became Roman Catholics:—

*Held*, that the interest of A. in the legacy and the interests of all the children of A. were forfeited from the date on which A. became a Roman Catholic.

ADJOURNED SUMMONS.

By her will, dated June 3, 1904, the testatrix, Harriet Morrison, gave to her great niece, Elizabeth Helen de Grey, 5000*l.*, and by cl. 5 of her will directed as follows: "I direct "that my trustees shall retain the legacy (unless it be a specific "legacy or a life interest only) to which any female legatee "shall or if she shall not survive me would but for her not "having survived me have become entitled under the provisions "hereinbefore contained . . . . . and shall invest such legacy "and hold the same and the investments for the time being "representing the same and the income thereof Upon trust "to pay such income to such legatee during her life and during "any coverture without power of anticipation and after "her death as to both capital and income In trust for all or "any one or more exclusively of the others or other of her "issue at such time and if more than one in such shares with "such provisions for maintenance education and otherwise at "the discretion of any person or persons and with such gifts "over and generally in such manner for the benefit of such

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"issue or some or one of them as she shall whether covert or "sole by deed revocable or irrevocable or by Will or Codicil "appoint and in default of and until and subject to any such "appointment and also if she shall not survive me In trust "for all or any her children or child who being sons or a son "have or has attained or shall attain the age of twenty-one "years or being daughters or a daughter have or has attained "or shall attain that age or have or has married or shall marry "and if more than one in equal shares."

Clause 17 provided as follows: "If either during my lifetime "or after my death any legatee under my will including any "person who shall benefit under this present clause shall be or "become a Roman Catholic or shall marry a Roman Catholic "or shall give any promise or shall come under any obligation "to bring up as a Roman Catholic any child of such legatee "then and in every such case and as from the occurrence of "such event such legatee shall absolutely forfeit and lose all "benefits and powers given to him or her by my Will including "this present clause and so that . . . . if any such benefit "be a life interest the fund out of which such life interest is "payable shall fall into and shall forthwith form part of my "residuary estate and be held upon the trusts herein declared "concerning the same and if any such benefit be an absolute "interest the same shall also fall into my residuary estate . . . ."

The testatrix died on December 17, 1909.

The said Elizabeth Helen de Grey was married once and once only and became on her marriage, Elizabeth Helen Blathwayt. There were three children of the marriage—namely, Christopher George Wynter Blathwayt, Justin Robert Wynter Blathwayt and Elizabeth Henrietta Blathwayt.

In 1934 Elizabeth Helen Blathwayt became a Roman Catholic. Her daughter also became a Roman Catholic of her own accord; neither of the sons of the marriage became Roman Catholics or were married to Roman Catholics.

The trustees of the will took out an originating summons for the determination of the questions whether, in the events which had happened, the life interest of the first defendant, Elizabeth Helen Blathwayt, in the legacy had been forfeited, and, if so, from what date, and whether the interests of all or some and which of the other defendants, the three children of the marriage, in the legacy had been forfeited, and, if so, from what date.

*Wilfrid Hunt* for the plaintiffs.

*E. G. Eardley-Wilmot* for the defendant, Elizabeth Helen Blathwayt. The condition is bad as it infringes the rule against perpetuities. There is no absolute vesting, so long as it can be defeated.

He referred to *In re Borwick.* (1)

*Horace Freeman* for the two sons of Elizabeth Helen Blathwayt. The interests of the sons are not defeated by reason of their mother having become a Roman Catholic. If there had been different estates, it could have been said that the condition was good as regards one and not as regards another. The trustees could not have paid the money until a date which would have involved an infringement of the rule against perpetuities.

*J. A. Reid* for a party interested in another settled legacy. This case is on all fours with *Hodgson* v. *Halford.* (2)

A child of the tenant for life must take a vested interest within twenty-one years of her death, but if the provision relating to Roman Catholicism is added, a child may take after the period of twenty-one years. The rule against perpetuities then comes into operation. A provision, therefore, that a person forfeits an interest under these circumstances, is not an effective provision.

The condition must be applied separately to each legatee and in each case it must be considered whether there is an infringement of the rule against perpetuities.

He referred to *Cattlin* v. *Brown.* (3)

*C. L. Fawell* for the legal personal representative of the residuary legatee.

Under no circumstances does this condition infringe the rule against perpetuities. All the interests are within the limits prescribed by that rule. He referred to *In re Russell. Dorrell* v. *Dorrell* (1); and *In re Game. Game* v. *Tennent* (2)

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(1) [1933] Ch. 657.
(2) (1879) 11 Ch. D. 959.
(3) (1853) 11 Ha. 372.

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BENNETT J. [after stating the facts and the question raised by the summons, continued :] On behalf of Mrs. Blathwayt and her daughter and her two sons it has been argued, first of all, that the condition in cl. 17 of the will is void, because it may operate at a point of time which is beyond a period of time measured by a life or lives in being and the period of twenty-one years; in other words, that the condition may infringe the rule against perpetuities. Secondly, on behalf of the two sons of Mrs. Blathwayt, it was argued that, so far as they are concerned, they are not affected by the fact that their mother has been received into the Roman Catholic Church, and that cl. 17, if it is valid, only operates to forfeit her life interest in the fund. As regards that last argument, with all respect to Mr. Freeman, who advanced it, I think there is nothing in it. If the clause operates at all, in my judgment it operates to defeat the interests of all persons to whom the testatrix has given an interest in the settled legacy. The substantial question is whether the clause is void because it may come into operation outside the perpetuity period. For the purpose of deciding the question I will assume, without deciding the point, that Mrs. Blathwayt's daughter and her two sons are legatees under the testatrix's will within the meaning of cl. 17. I assume that. I do not decide it. The argument is that cl. 17 applies not only to a legatee ascertained within the perpetuity period who does the prohibited act within that period, but also to a legatee ascertained within the perpetuity period who does the prohibited act at a point of time outside it, and therefore the clause as a whole is bad, because it may defeat at a point of time outside the period fixed by the rule against perpetuities an interest then vested. The question is whether the clause must be applied in that way, or whether it can be applied separately to each person who becomes a legatee under the will so that if the person to whom it is sought to apply it is a person who must do the act which

(1) [1895] 2 Ch. 698.

(2) [1907] 1 Ch. 276, 282.

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brings about the result within the perpetuity period, then, as regards that person, the condition is good, although, if applied to another legatee under the will, it may be bad, because that person may do the prohibited act outside the perpetuity period.

I think the question is settled in favour of those who have argued for the validity of the provision by the decision of the Court of Appeal in the case of *In re Russell.* (1) There "A "testator gave his residuary estate in trust, after the death of "M. and her husband, for all the daughters of M. who should "attain twenty-one or marry under that age; with a proviso "that the share of any daughter should be held upon trust for "her for life, and after her death upon similar trusts for her "children as were thereinbefore declared for the children of M. "M. had one daughter only, the plaintiff, who attained twenty-"one, and she was born in the lifetime of the testator." It was held by the Court of Appeal, affirming the decision of Chitty J. "that the proviso for resettlement of the shares must "be construed as applicable to each share separately; and "that although it would have been void for remoteness in the "case of daughters born after the death of the testator, it "was valid in the case of the plaintiff, and therefore she "was only entitled to a life interest in the fund."

Rigby L.J., delivering the judgment of the Court of Appeal, said (2): "It is suggested that the proviso for the settlement of the "shares which I have read is void for remoteness, inasmuch as "there might have been a daughter of Mary Dorrell born after the "testator's death who would live to take a vested interest, "and whose children would not necessarily attain twenty-one "within the period allowed by law for the postponement of "the vesting of a benefit. No doubt, in the case of such a "daughter, the settlement over directed by the proviso would "have been void; but it would be perfectly good as to the "interest taken by the plaintiff, who was alive at the testator's "death, unless the possible operation of the proviso with "reference to the share of a daughter not in existence at the "testator's death make the whole proviso void. Looking at

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(1) [1895] 2 Ch. D. 698.

(2) Ibid. 702.

"the state of things at his death, it was then clear that the "plaintiff must take either the whole or a share, and other "daughters of Mary Dorrell might come in and take shares. "Assuming them to do so, yet the share of the plaintiff and the "shares of such other daughters would be perfectly separate "and distinct, and completely ascertained and separated "within the limits of vesting allowed by the law. The proviso "in no way mixes them up, but operates separately upon "each share. The settlement of the plaintiff's share directed "by it is perfectly legal, and would have been so even though "there were other shares to which the proviso could not legally "apply. If, indeed, there had been a proviso which could "only operate upon all the possible shares, if it operated at all, "the case would have been different; but the settlement of the "plaintiff's share is to take place, whether there are other shares "or not, and it takes place as from the testator's death in "favour of the children of a person then living, and is quite "unobjectionable. This is not the case of a gift over, which "depends upon events so stated as to involve a possibility of its "taking effect outside the permitted limits, or in favour of "persons who might take interests vesting beyond those limits. "No splitting of the clause is necessary, since it is so framed as "to apply separately to the plaintiff's share."

Now I think upon the true construction of cl. 17 of the testatrix's will, upon the hypothesis that the word "legatee" includes every person who takes a benefit in a legacy under the will, the clause is capable of being applied separately to the interests of that legatee and upon that footing, if he or she does the prohibited act and must do it within the perpetuity period, then as regards that person it seems to me the condition is valid upon the principles stated by Rigby L.J. Indeed, it seems to me that that must have been the footing upon which Hall V.-C. decided the case of *Hodgson* v. *Halford*. (1) The result, I think, is that the answer to the question on the facts proved is that the interest of the first defendant in her settled legacy has been forfeited from the date when on her behalf it has been admitted she was received into the Roman Catholic Church. Under the terms

(1) 11 Ch. D. 959.

of the seventeenth clause it follows, in my judgment, that the interests of all of the children in the same legacy have been forfeited and from the same date. The terms of the clause provided that if the benefit forfeited be a life interest, the fund out of which such life interest is payable shall fall into and shall forthwith form part of the testatrix's residuary estate.

Solicitors: *Johnson, Jecks & Colclough; Thorold, Brodie & Bonham-Carter; Woolley & Whitfield.*

J. L. D.

## *In re* EAVES. EAVES *v.* EAVES.

C. A.

1939

Oct. 19, 20, 23;
Nov. 13.

[1938. E. 686.]

*Will—Property to be enjoyed by wife during widowhood—Marriage ceremony—Wife as trustee of estate consenting to distribution of property—Marriage not consummated—Decree of nullity twelve years after ceremony—Widow's claim to income of property.*

Under the will of a testator who died in 1919 certain property was held by his widow and his son as trustees upon trust for the widow during her widowhood and subject to her interest for the son absolutely. In 1925 the widow went through a ceremony of marriage and in contemplation of this agreed shortly before the marriage to the property being handed over to the son. In 1937 a decree of nullity of marriage was pronounced on the ground of the husband's incapacity:—

*Held,* (1.) that as the status of husband and wife continued from the date of the marriage to the date of the decree of nullity, a transaction completed during that time on the footing that the testator's widow had ceased to be a widow could not be set aside, and it made no difference that the transaction was carried out shortly before the solemnization of the marriage though in expectation of it; and (2.) that the widow's claim to a life interest in the property handed over could not be supported as a claim for money had and received, or as one analagous thereto.

Decision of Farwell J. [1939] Ch. 1000 affirmed.

Per Clauson L.J. The widow having consented to the transaction, she could not afterwards question its legality against one who on the faith of her conduct had acted on it.

The origin of the present form of the decree of nullity discussed by Goddard L.J.

APPEAL from Farwell J. (1)

By his will dated January 8, 1918, the testator, Charles Hobley Eaves, gave his wife, Emily Eaves, the plaintiff, the use during her life and widowhood of a leasehold house in Calthorpe Road, Edgbaston, Birmingham, for the unexpired residue of the term for which he held it. After making certain other bequests he devised the residue of his property to Harold Charles Eaves, the defendant, his son by a previous marriage. He died on December 13, 1919, the plaintiff and the defendant being the executors and trustees of his will. They sold the lease and invested the proceeds of sale in the

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(1) [1939] Ch. 1000.

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purchase of War Stock in their joint names, it being agreed that the plaintiff was to be entitled to the income during her life or widowhood. On September 24, 1925, she went through a ceremony of marriage and, a short time before this, on the footing that her interest in the War Stock would then cease, she agreed to its sale and allowed the defendant to receive the proceeds and use them for his own purposes. The marriage was never consummated, and on May 4, 1937, she obtained a decree nisi declaring it null and void on the ground of the husband's incapacity. On November 15, 1937, the decree absolute was pronounced.

In this action the plaintiff claimed a declaration that she was entitled to a life interest in the proceeds of sale of the War Stock on the ground that her widowhood had continued since the testator's death.

Farwell J. said that the question of the effect of a decree of nullity of marriage had been considered in several reported cases and by himself in *Fowke* v. *Fowke.* (1) There was no doubt that as from the date of the marriage ceremony the man and wife had the status of married persons and retained it until the marriage was declared null and void. But it seemed to him that as the marriage had been treated by the Divorce Court as null and void, which meant null and void ab initio, the widowhood of the plaintiff had never determined. But that did not conclude the matter. The position was that the lady being about to enter into a second marriage agreed that the fund in which she had an interest during widowhood should be handed over to the defendant, who was the only other person interested in it. The lady then went through the ceremony of marriage with a man with whom for many years she lived ostensibly as his wife, and during that whole period she took no steps to have her marriage annulled and permitted the defendant to remain in possession of the fund. In his judgment she could not succeed in this action. She acquiesced in the fund being handed over to her co-trustee and the fund was no longer in existence. And she took no steps throughout the years which elapsed after the ceremony

(1) [1938] Ch. 774.

of marriage had been solemnized until quite recently to have her marriage annulled or to interfere with the position to which she had been a party. In his judgment it would be most inequitable now to hold that the defendant was bound to recoup the money. The position might have been different if the fund was still available or if she had not been a trustee. But as it was the action must be dismissed.

The plaintiff appealed. The appeal was heard on October 19, 20 and 23, and judgment given on November 13, 1939.

*Charles Harman K.C.* and *E. M. Winterbotham* (for *Gerald Upjohn* on active service). The decree of nullity declared the marriage to be and to have been absolutely null and void, and therefore it was never a valid and effectual marriage: *In re Wombwell's Settlement.* (1) Here it was clearly the intention to pay over the money to the respondent on the eve of a valid and effectual marriage and that there has never been. The appellant never lost her status of widowhood, as the decree of nullity has a retrospective effect: *Newbould* v. *Attorney-General.* (2) Because the appellant did not bring her action for nullity at an earlier date she cannot be accused of "want of "sincerity": see Lord Selborne in *G.* v. *M.* (3) The Irish case of *P.* v. *P.* (4) is directly in point. There, in contemplation of marriage, a sum of money had been paid by the wife to the husband, and, on her obtaining a decree of nullity, she was held to be entitled to recover the money. This case was referred to at length by Lawrence J. in *Dodworth* v. *Dale.* (5) Here on the decree being made the appellant resumed her status of widowhood. Farwell J. found as a fact that her widowhood had never determined, but he found against her on the question of acquiescence or laches.

There are four questions here. The first has so far been argued and it is whether it can be truly said that the appellant ever ceased to be a widow. It is true that she had the status of a married woman between the date that the ceremony of her second marriage was solemnized and the date of the decree of nullity; but the very fact that the authorities only recognize the existence of a status in such a case shows that the appellant was never a married woman in fact and accordingly that she is still entitled to the income of the fund in question.

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(1) [1922] 2 Ch. 298.

(2) [1931] P. 75.

(3) (1885) 10 App. Cas. 171, 185–6.

(4) [1916] 2 I. R. 400.

(5) [1936] 2 K. B. 503, 515–18.

Secondly, it is said that there was here a concluded transaction which cannot afterwards be set aside, and *Dodworth* v. *Dale* (1) is relied on. That could not be so as long as the appellant remained a widow, for the transaction depended on this; what Lawrence J. said in *Dodworth* v. *Dale* (1) only applies to the income of the fund handed over in mistake of fact during the period that the appellant had the status of a married woman. If the fund had continued in existence, the Court must have said that the income went to her as from the termination of the status of a married woman, when the appellant was proved to have never be validly married and the decree of nullity made. The fact of purporting to wind up the trust could not terminate the transaction, as in fact the time came when she could say that she was still the testator's widow and that the transaction was entered into by her in mistake of fact. If Lawrence J.'s decision went as far as to decide that it did, then it was erroneous. But he only dealt with allowances of income during the period where in that case the status continued.

Thirdly, if this were an ordinary action between beneficiaries and there were independent trustees who had been called upon to hand over the fund by reason of the marriage, the appellant would be entitled to sue the recipient of the fund in respect of money paid over in mistake of fact. The marriage was void ab initio and the decree declaring this to be so must have the same effect as in the cases of a bigamous marriage or a marriage made illegal by the consanguinity of the spouses.

[GODDARD L.J. In those cases no decree would be required to render the marriage void.]

(1) [1936] 2 K. B. 503, 519.

That is so. The mistake of fact here was that both parties thought that the appellant was ceasing for ever to be the widow of her first husband.

[SIR WILFRID GREENE M.R. Two matters are involved. First, ignorance of the impotence of her husband and, secondly, the exercise by the lady of her option to have the marriage declared void. The latter was not a mistake of fact but of intention in case a certain event happened.]

The mistake of fact was in thinking she was entering into a valid marriage. Some reliance was placed by the respondent on the statute of limitations, but that, as the judge held, could not apply.

[GODDARD L.J. The appellant knew her marriage was invalid but took no steps for several years.]

The statute could not run against her till the decree of nullity was made. It was only then that the right of action arose.

[SIR WILFRID GREENE M.R. Surely the statute runs from the date of payment.]

That is the rule at common law but not in a case such as this: see *Baker* v. *Courage & Co.* (1) and *In re Robinson. McLaren* v. *Public Trustee.* (2)

Lastly, Farwell J. was wrong in holding that the appellant had been guilty of laches and acquiescence. This was a point taken for the first time in the judgment and if it had been taken by the other side, the appellant could have given evidence to show that she had good reason for the delay in bringing nullity proceedings.

[SIR WILFRID GREENE M.R. However good her reasons, that could not affect the respondent, who was left in ignorance of the facts giving rise to this action.]

It is a matter on which the appellant ought to have had an opportunity to give evidence.

[They also referred to *Fowke* v. *Fowke.* (3)]

*Spens K.C.* and *F. Baden Fuller* for the respondent. Farwell J. shrank from saying that the appellant's second marriage brought her widowhood to an end and it may be that he

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(1) [1910] 1 K. B. 56.
(2) [1911] 1 Ch. 502.
(3) [1938] Ch. 774.

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was influenced by *In re Wombwell's Settlement* (1), but that was an entirely different case.

The cases of *In re Wombwell's Settlement* (1) and *Dodworth* v. *Dale* (2) show that where there is a completed transaction that is valid at law, the Court will refuse to go back on it after a lapse of time, because of a retrospective decree. It makes no difference that the transaction was effected a few weeks before the marriage, though in direct contemplation of it, and the whole transaction cannot be set aside. Until the wife intervened and obtained a decree of nullity, every one was bound to treat her marriage as valid: *In re Wombwell's Settlement.* (1) It was clearly laid down in *Dodworth* v. *Dale* (2) that a completed transaction cannot be re-opened on the marriage being declared void. It might be different if the trust fund had been kept on foot, as in a case where the widow's life interest was followed by another one: see *In re Wombwell's Settlement* (1); but here there was a concluded transaction. The fund was vested in the respondent as absolute owner and he has dealt with it as absolute owner. It is sufficient to say here that the persons who were the trustees and the sole beneficiaries wound up the trust and therefore the appellant is not entitled to the income of the fund. In such a case the income and the capital stand on the same footing. The case would be no stronger if the distribution had been made under the order of the Court. Such an order is unobtainable when the parties are all agreed and consenting to the distribution.

[They referred also to *Dunbar* v. *Dunbar* (3) and *Turner* v. *Thompson.* (4)]

*Charles Harman K.C.* replied.

*Cur. adv. vult.*

1939. Nov. 13. SIR WILFRID GREENE M.R. The grounds upon which, in my opinion, this appeal ought to be dismissed are as follows:—

(1.) When the appellant went through the ceremony of marriage with Mr. Powell in 1925 the respondent would have been entitled to call for the transfer of the trust fund to himself upon the ground that as the result of the ceremony the appellant's widowhood stood determined. If the appellant had declined to consent to the transfer the respondent could have obtained an order of the Court for the purpose. The appellant could not have been heard to say that she was entitled to have the transfer postponed in order to see (*a*) whether facts would appear which would entitle her to obtain a decree of nullity and if so (*b*) whether she would or would not decide to apply for such a decree.

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(1) [1922] 2 Ch. 298, 308.
(2) [1936] 2 K. B. 503.
(3) [1909] 2 Ch. 639.
(4) (1888) 13 P. D. 37, 41.

(2.) If an order of the Court had been made directing a transfer of the fund to the respondent, it would have been impossible for the appellant to make the present claim. The transaction would have been one properly completed at a time when the marriage was a valid marriage, and it is well settled that such transactions cannot be re-opened, notwithstanding the language in which the form of nullity decree in use is couched.

(3.) If instead of obtaining an order of the Court the transfer had been made after the ceremony by agreement, the same result would have followed, namely, the transaction could not have been re-opened. To hold otherwise would mean that no one could safely act in any case of an interest determinable on widowhood without obtaining the protection of an order of the Court.

(4.) In the present case the transfer was made and the trust wound up by agreement in contemplation of what in fact took place, namely, the remarriage of the appellant and not after the ceremony, but this makes no difference.

(5.) The argument that the transfer can be set aside upon the ground that it was made under a mistake of fact does not bear examination. The transfer took place upon the footing that a marriage was about to take place which would give to the appellant the status of a married woman which it in fact did. If, however, it be assumed that the understanding was that the marriage would not be annulled (an assumption which I am not prepared to make) the mistake would not have been a mistake of fact ; it would have been, so to speak, a composite mistake, partly of fact and partly of intention—of fact in

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so far as it concerned the matters which gave rise to the right to have the marriage annulled; of intention in so far as the exercise of an option by the appellant was required before annulment could take place.

(6.) There is no foundation for the suggestion that the claim can be treated as one for money had and received or as analogous thereto.

CLAUSON L.J. In the year 1925 a sum of 5 per cent. War Stock stood in the names of the plaintiff and defendant, as trustees of the will of the plaintiff's deceased husband. The income of the fund was, by reason of the terms of the will, payable to the plaintiff during her life and widowhood : subject to that interest of the plaintiff the fund belonged beneficially to the defendant, her stepson. In the year 1925 the plaintiff was minded to remarry and appreciated that her interest in the fund would terminate with her widowhood. The plaintiff and the defendant arranged to wind up the trust by selling the stock and the proceeds were, as part of the arrangement, received by the defendant, he paying to the plaintiff interest up to the actual day of her remarriage, which took place on September 24, 1925. The defendant paid into his bank the proceeds so received and they in fact seem to have gone to reduce his overdraft; at all events he took and used the proceeds as his own, in precise accordance with the intentions of himself and of the plaintiff.

Twelve years passed and on November 15, 1937, a decree absolute was pronounced annulling the plaintiff's second marriage on the ground of the incapacity of the intended husband. The decree was in the usual form declaring the marriage to be and to have been absolutely null and void, and the plaintiff to have been and to be free from all bond of marriage with the intended husband.

Thereafter the plaintiff brought the present action claiming against the defendant replacement of the trust fund and payment of the income from the date of the annulled marriage, or alternatively from the date of the decree absolute of annulment.

The learned judge has dismissed the action. He was not prepared to hold that the solemnization of the marriage, which was subsequently annulled, of itself terminated the plaintiff's interest in the fund in question. On the contrary, he held that after the decree the widowhood of the plaintiff must be considered to subsist.

His Lordship, however, held that the fact that with the knowledge and consent of the plaintiff the trust fund had ceased to exist as a trust fund and had been handed over to the defendant, made the plaintiff's claim one which a court of equity would refuse in the circumstances to admit: and he accordingly dismissed the action. In my judgment his Lordship could not, without infringing well established principles, do otherwise than dismiss the action. In the first place, it is well settled that until the decree absolute the two parties to the marriage have the status of married people, a status which must be treated as continuing during the period that the marriage remains unannulled; with the result that transactions which have been concluded, things which have been done, during that period on the footing of the existence of that status, cannot be undone or reopened. It is unnecessary to set out the authorities on this point since the whole matter is fully dealt with in the judgment of Lawrence J. in *Dodworth* v. *Dale* (1) in terms with which I will venture to express my complete agreement. The material transaction in the present case was the handing over of the fund to the defendant as his own in anticipation that on September 24, 1925, the lady would acquire the status of a married woman. On September 24, 1925, she acquired that status, and the transaction then became complete and effectual, and could not have been questioned in any court at any time before the decree of annulment, and the annulment cannot have the effect of undoing or reopening such a transaction. This ground alone suffices to justify the dismissal of the present action.

There is, however, a further ground which would, in my view, support the dismissal of the action. It is well settled that if a party has so acted that the fair inference to be

(1) [1936] 2 K. B. 503.

drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal: see *Cairncross* v. *Lorimer*. (1) The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error: see *Sarat Chunder Dey* v. *Gopal Chunder Laha*. (2) In the circumstances of the present case the defendant was left by the plaintiff to act, and did in fact act, on the view that the winding up of the trust was a completely legal transaction, leaving the fund in his hands as his own for him to spend, and it appears to me to be contrary to all principle that the plaintiff should now be heard to question the legality of the transaction. It was argued that the claim could be treated, or ought to be treated, as an action for money had and received to which no statute of limitations had been pleaded. I have had some difficulty in appreciating what the money is which the defendant is to be treated as having received. It cannot be the fund, for that was never the plaintiff's: nor can it be the income of the fund since the fund ceased to exist as a fund even before the date of the marriage. The truth is that the claim can only be a claim for the replacement of a trust fund, and to such a claim the considerations which I have stated afford, in the circumstances, a complete defence.

I am accordingly of opinion that the appeal should fail and be dismissed with costs.

GODDARD L.J. In my opinion this appeal should be dismissed, though I base my judgment on grounds somewhat different from those on which I understand that Farwell J. decided the case.

When Mrs. Eaves went through the ceremony of marriage with Mr. Powell in 1925, in my opinion, she ceased to be the widow of Mr. Eaves, notwithstanding that subsequently the marriage proved to be voidable at her option. It is well established by authority that a marriage contracted by persons, one of whom is impotent, is valid unless and until the spouse who is entitled to complain has exercised the right of having it annulled. Until this has happened the spouses are man and wife ; were either of them to go through another ceremony of marriage he or she would be guilty of bigamy, and it would be no defence to allege the impotence of the other party. No third party, either during the lifetime or after the death of either spouse, could be heard to say that the marriage was invalid ; it can only be annulled on the complaint of a party thereto and during the lifetime of both. I say of a party because the rule is that only the injured spouse can complain, though there have been cases of a wholly exceptional character where a petition has been admitted at the suit of the impotent party. Thus, where in Ireland a wife had petitioned the Ecclesiastical tribunal of the Roman Catholic Church and obtained a sentence of nullity, which had no effect in municipal law and she had while wholly repudiating the marriage refused to apply to the Courts for a declaration of nullity, the husband was allowed by Warren J. and by the Court of Appeal to present a petition alleging his own impotence to get rid of an otherwise intolerable situation brought about by the wife : see *A.* v. *A.* sued as *B.* (1) approved by the Court of Appeal in England, *G.* v. *G.* (2) On Mrs. Eaves' marriage to Mr. Powell she thus became his wife de jure unless and until she elected to have the tie annulled. Consequently she ceased to be the widow of her late husband, and one may well ask, supposing that the defendant had been merely a trustee under the will and not also a beneficiary, what answer could he have had to a claim by the person entitled in remainder to have the capital sum paid over to him ? But it is said that as soon as the plaintiff had obtained her decree absolute she reverted to the status of widowhood and thereby once again became entitled to the benefit conferred upon her while she was the widow of Mr. Eaves. On this point I am content to adopt the reasoning

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(1) (1860) 3 Macq. 827, 829.
(2) (1892) L. R. 19 I. A. 203, 215, 216.

(1) (1887) 19 L. R. (Ir.) 403. (2) (1908) 25 Times L. R. 328.

of Lawrence J. in *Dodworth* v. *Dale.* (1) That was a case in which the Inland Revenue made a claim at least as unmeritorious as that in the present action. They claimed that as a marriage had been annulled at the suit of a wife the husband was liable to refund the tax on the marriage allowance which had been claimed by him and admitted during the period of the marriage. The claim deservedly failed, the learned judge holding that matters concluded during the period when the marriage stood could not be reopened after the wife had exercised her option to have the tie annulled. It can, in my opinion, make no difference that the transaction now called in question took place a month or so before the marriage was celebrated. The parties deliberately put an end to the trust on the footing that the marriage was about to take place, as it did, and though the present defendant would no doubt have been liable to replace the fund had the ceremony not been performed, when once it was, both the legal and equitable interest was vested in him, and the trust was by the common consent of both parties interested therein effectively wound up. The decision of Russell J. in *In re Wombwell's Settlement* (2) also supports this view for he says (3): "It is quite true that no claim could be made by "him (the settlor) for the return of the payments made by "the trustees during the time when the validity of the "marriage was not questioned, for, unless and until the wife "intervened, all parties were bound to treat the marriage as "valid and effectual."

It was also sought to support the plaintiff's claim on the ground that here there was a case of money had and received for the plaintiff's use. I can see no ground for such a contention. The fund never was the plaintiff's: during widowhood she was beneficially entitled to the interest arising from it. That she surrendered when she was about to re-marry and it was entirely at her option whether she avoided the marriage or not. As Sir James Hannen put it in *Turner* v. *Thompson* (4): "It is to be remembered that a marriage by the law of England,

(1) [1936] 2 K. B. 503.
(2) [1922] 2 Ch. 298.
(3) [1922] 2 Ch. 308.
(4) 13 P. D. 37.

"when one of the parties is incompetent, is not a marriage "absolutely void, but only voidable at the instance of the "injured party. If she had thought fit she might have "remained a wife, enjoying all the advantages of a wife, save "that of marital intercourse."

This case would hardly be arguable were it not that the form of the decree in these cases, whatever be the ground for annulling the marriage, pronounces that the petitioner is and always has been free of the bonds of matrimony. But in truth a successful petitioner on the ground of impotence has not always been free: what is true is that he or she has always been in a position to obtain freedom, but until the necessary steps have been taken the tie remains binding. The reason, I think, why the decree takes this form is that it follows the sentence formerly pronounced in the Ecclesiastical Courts, and when the Matrimonial Causes Act, 1857, was passed, the Courts set up by that Act, now represented by the Probate, Divorce and Admiralty Division of the Supreme Court, were directed by s. 22 to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had hitherto acted. Ecclesiastical jurisprudence was grounded on the Canon Law which regards marriage as indissoluble. The sentence of divorce mensa et thoro was only a decree of judicial separation, while a sentence of divorce a vinculo matrimonii was not one granting a dissolution of the marriage but was in effect a declaration that no marriage ever existed. But the Canon Law did grant relief when one of the parties was incapable of performing one of the purposes for which marriage was instituted; therefore as the marriage could not be dissolved recourse was had to the same form of sentence as in the case of a marriage void on the ground of bigamy, consanguinity, non-age or undue celebration. In none of these cases is intervention of the Court an absolute necessity, as it is in the case of impotence, to free the parties. The object and advantage of obtaining a decree in those circumstances is by obtaining a judgment in rem to put at rest for all time the question as to whether the parties were lawfully married and are or are not free to marry again during the lifetime of the other. It may be that it would be more logical to treat impotence as a ground of divorce, as it is in America, where the jurisdiction is not hampered by the rules of the Canon Law; be that as it may, the marriage is valid until it is annulled by a decree of the Court and transactions which have taken place during the marriage on the footing that it is subsisting, or in direct contemplation of a marriage which afterwards takes place, cannot be affected by a subsequent decree of annulment. I need hardly add that quite different considerations would apply were the marriage to be void and not merely voidable.

It remains to deal with the grounds on which the learned judge based his judgment in favour of the defendant. He found, as I read his judgment, that though the plaintiff was the widow of the testator she was disentitled to recover in the action by reason of her laches and acquiescence. I have already dealt with the question as to the widowhood. So far as the judgment is founded on acquiescence I think it is on sure ground. It is because she acquiesced and consented to the money being appropriated by the defendant that she cannot recover. But in my opinion laches, that is delay in bringing the action, or at least in notifying her claim, raises a question of some considerable difficulty, and I am indisposed to base my judgment on that ground, apart from the fact that it was not pleaded. The main difficulty I feel is to say from what time or at what point did the delay begin and how it affected the defendant. Laches is a part of the law of estoppel, and as I understand the doctrine it is that if a person has stood by and allowed another to order his affairs on the footing that a certain state of things exists or that a certain transaction is not questioned, he cannot thereafter be allowed to come in and assert the contrary to the detriment of the other party. But here the detriment would arise at once. Having got the money and very likely spent it, the defendant might be equally prejudiced whether the plaintiff had made her claim twelve days or twelve years after the ceremony took place. When one considers the delicate and intimate nature of the matters involved where questions of impotence arise it seems to me impossible to say at what particular time the plaintiff ought to have made a claim against or disclosure to the defendant. While delay is one of the discretionary bars to divorce it is not so to a petition for nullity. Precipitate action in these cases ought to be discouraged; patience and forbearance, at any rate in the case of young married people, may remove the ground of complaint, and while the defendant is not affected by considerations affecting only the husband and wife, I find it very difficult to say that at any particular time the plaintiff was guilty of unreasonable delay in making her claim and thereby prejudiced the defendant. It is, I think, this very difficulty that lies at the root of the doctrine that transactions completed during the existence of the union cannot be re-opened after the decree of nullity has been obtained, and it is on that ground that I prefer to base my judgment.

I desire to add that I am not satisfied that it necessarily follows that if a man leaves money to his wife during widowhood or " While she remains my widow," she can, after contracting a marriage which she subsequently avoids, say that she has reverted to the status of widow of her former husband, at any rate for the purpose of retaking benefits under his will. I think most testators would be surprised to learn that this result would follow, more especially when it is remembered that she can now apply, under s. 190 of the Judicature Act, 1925, for maintenance against the man whom I may call the second husband. It is unnecessary to decide this in the present case and I desire to reserve my opinion upon it.

*Appeal dismissed.*

Solicitors: *Gisborne & Co.; Ward, Bowie & Co., for Lane, Clutterbuck & Co., Birmingham.*

H. C. G.

CROSSMAN J.

1939

Nov. 30; Dec. 1, 5, 6.

## *In re* O'KEEFE (DECEASED).

## POINGDESTRE *v.* SHERMAN.

[1939. O. 540.]

*Conflict of laws—Intestate succession to personal estate—Italian domicil of choice of intestate—Law of the nationality—Italian code—Domicil of origin of intestate—Part of British Empire—Domicil of origin in Eire — Law applicable — Distribution of intestate's personalty.*

M. A. O'K. died intestate and a spinster in Naples, Italy, in 1937, having lived there continuously for forty-seven years. Her father was born in County Clare, Ireland (now part of the Irish Free State [Eire]), in 1835. During practically the whole of her life the intestate (who was born in India) lived at various places in England, France and Spain before settling down in Italy. She visited Ireland only once in her lifetime, when on a short visit with her father. Certain questions arose at her death as to the administration of her estate which consisted entirely of personalty.

At the hearing the Court held that she had acquired a domicil of choice in Italy at the time of her death, but that she had never acquired Italian nationality. Italian law was silent on the question of the law of the nationality where more than one system of such law was applicable.

Expert Italian legal opinion, however, which was not disputed, was to the effect that Italian law would hold that the succession would be regulated by the law of the country to which the deceased belonged at her death.

The question therefore arose (the Court having held that her nationality was British) whether the personal estate of the intestate was distributable under the law of England, the law of Eire (the Irish Free State) or the law of British India :—

*Held*, that though the intestate could not, by reason of the law of Eire, namely, art. 3 of the First Schedule to the Constitution of the Irish Free State Act, 1922, be said to be, in the circumstances, a citizen of Eire at her death, yet on all the facts of the case and having regard to the expert Italian legal opinion as to the law of succession applicable, the only part of the British Empire to which she could be said to have belonged was the part from which she had originated, namely, Ireland (Eire). The law applicable therefore for the distribution of her estate was the law of Eire applicable to a person dying intestate domiciled in Eire.

ORIGINATING SUMMONS.

Mary Alice O'Keefe (hereinafter called "the intestate") died a spinster and intestate on December 30, 1937, at Naples in Italy, where she had resided continuously for forty-seven years, having gone there in the year 1890. On February 6, 1939, letters of administration were granted in respect of her estate (she only possessed personal estate) to the plaintiff, Eva Julia Poingdestre (a sister of the whole blood), out of the principal probate registry. The intestate also left her surviving another sister of the whole blood, the first-named defendant, Jane Margaret M. Sherman, and a brother and sister of the half-blood, namely, the second and third defendants, Francis Joseph O'Keefe and Agnes Mary O'Keefe. Both her parents predeceased her.

The material facts (which were not in dispute) were as follows: The intestate's father, James William O'Keefe, was born at Ennis in County Clare, Southern Ireland (now part of the Irish Free State), in 1835. In or before the year 1857, he went to India, and about 1858 he married a lady of Irish parentage in Calcutta. The intestate was born of that marriage in Calcutta about the year 1860, and the plaintiff was born of the same marriage in Calcutta about the year 1863.

About the year 1867 the intestate and the plaintiff were brought by their parents to Boulogne, in France, and lived there with an aunt, while the parents went to England and spent the father's leave there. Later in the same year the parents called for the intestate and the plaintiff at Boulogne, and they all returned to India. About the year 1873 the parents brought the intestate and the plaintiff to Lyons in France and placed them in a convent there for their education. In the same year the parents returned from England (where they had gone for the father's leave) to India with the first defendant, Jane Margaret Mona Sherman (who had been born in India), and a son, Terence O'Keefe (who had been born in England while the parents were on this English visit). They were the third and fourth children of the marriage above referred to. On the return of their parents to India, both the intestate and the plaintiff were left at the convent. The mother of the intestate, and also of the plaintiff and the first defendant, died in Calcutta about the year 1877, and about the year 1878 the father came to Lyons and took the intestate and the plaintiff for a short tour in Ireland and then placed them at a convent at Roehampton, near London, to complete their education.

In October, 1878, the father married his second wife in London and took her back to India. There were three children of this second marriage, namely, the second and third defendants, Francis Joseph O'Keefe and Agnes Mary O'Keefe, and another daughter, Ella O'Keefe. Terence O'Keefe, who was the fourth child of the first marriage, and Ella O'Keefe, the third child of the second marriage, both predeceased the intestate without leaving issue. About the year 1880 the intestate left the convent in Roehampton and joined the father and stepmother in India. About the year 1884 the father brought the intestate with the rest of his family to England and after spending the winter with them in the Isle of Wight he took a house at Ramsgate in Kent. About this time the father went to Ireland for about three weeks, and, later, leaving his wife and family in England at Ramsgate, returned to India and died in Calcutta in February, 1885. After that the intestate lived for a short time in Spain and Tangier, and in the year 1890 for a short time in the Channel Islands. In that year she went to Naples and lived there until her death forty-seven years later in the year 1937.

The first two questions raised by the summons were (1.) whether the domicil of the intestate at the date of her death was in Italy or if not what was her domicil at the date of her death; (2.) whether if the intestate was domiciled in Italy at her death any personal estate as to which she died intestate was to be distributed among the persons entitled thereto—(*a*) under the law of England, (*b*) under the law of Eire, or (*c*) under the law of British India.

*L. M. Jopling* for the plaintiff. The law applicable in respect of the intestate's personal estate is the law of England; the law of the Irish Free State cannot, it is submitted, apply: see art. 3 of the First Schedule to the Irish Free State Constitution Act, 1922 [Sess. 2, c. 1], which defines citizenship of the Irish Free State. It is admitted that her domicil of choice must have been Italian: see Cheshire on Private International Law, 2nd ed. (1938), at p. 161. He also referred to *In re Johnson* (1), and Atkin J.'s remarks in *Gavin Gibson & Co.* v. *Gibson* (2), on *In re Johnson* (1); and *In re Askew.* (3)

*Hon. Denys B. Buckley* for the first defendant, Jane M. M. Sherman. Here the question of the domicil of origin is not applicable; it is really a question as to what part of the British Empire the intestate belonged at the date of her death. In all the circumstances the law of England should be applied. Her father had certainly never acquired an Indian domicil. The law also of Eire (the Irish Free State) is excluded, see the English statute, the Irish Free State Constitution Act, 1922 (Session 2), (13 Geo. 5, c. 1), First Schedule, art. 3. There (in Ireland) a different system of citizenship has been adopted. By the law of Eire the intestate could not have been in the circumstances a citizen of Eire at her death. The law of England is therefore the only one left; she was an English national and the Court must therefore apply English law. He referred to *In re Ross* (4) and *In re Askew.* (3) The question for the Court is which system of municipal law ought here to be applied to this particular propositus. And see Cheshire on Private International Law, 2nd ed., p. 162. If the Court decides that the law of England is applicable, that ends the matter. *In re Johnson* (5) is relied on here for the application of English law. The intestate having been a British national, the Court should, it is submitted, apply English law.

*Wilfrid Hunt* for the second and third defendants, Francis J. O'Keefe and Agnes M. O'Keefe, the intestate's brother and sister of the half-blood. The law to be applied here is British law—the law of some part of the British Empire, not necessarily English law: see Cheshire on Private International Law, 2nd ed., p. 161. *In re Ross* (1) as a decision, it is submitted, covers this case. The question of the domicil of origin must be considered; this species of domicil must always be there ready to spring up when another subsequently acquired domicil comes to an end; it is only in abeyance; on principle the domicil of origin must be taken as the starting point, it never leaves a subject from his birth to his death; compare *In re Ross* (1) and *In re Askew* (2), and see Dicey's Conflict of Laws, 5th ed., at p. 872. On principle, as no law of the nationality applies, the Court must, it is submitted, say what law is applicable, it need not always be English law. There is a test: both Maugham J. and Luxmoore J. decided that in the cases above referred to. It is to be found in the domicil of origin: see Dicey's Conflict of Laws, at p. 97; the fact in this particular case now before the Court that the domicil of origin is in the Irish Free State makes no difference: see Dicey at p. 51. It is admitted that the intestate was not a citizen of Eire at the time of her death, but that is immaterial. Her domicil of origin governs the case.

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(1) [1903] 1 Ch. 821.
(2) [1913] 3 K. B. 379, 388.
(3) [1930] 2 Ch. 259, 268.
(4) [1930] 1 Ch. 377, 405.
(5) [1903] 1 Ch. 821, 832.

CROSSMAN J. This case relates to the estate of Mary Alice O'Keefe, who died a spinster and intestate at Naples in Italy in the year 1937. The facts are not in dispute.

[His Lordship stated the facts:] The intestate never acquired Italian nationality, but on the evidence which I have shortly detailed I hold that the intestate was domiciled in Italy at the time of her death. That answers the first question raised by the summons. I do not think that there has been any serious dispute as to that. I think that both sides really accept the view that she had acquired a domicil of choice in Italy at the time of her death. I think that it is also quite clear that her domicil of origin was in Southern Ireland, which is now part of the Irish Free State.

The second question raised by the originating summons is whether the personal estate (I understand the intestate had personal estate only), as to which she died intestate is distributable—(*a*) under the law of England, (*b*) under the law of Eire, or (*c*) under the law of British India. Prima facie the law applicable is the law of the intestate's domicil at the time of her death, that is to say, Italy. But by the law of Italy, as to which I have evidence from the affidavit of one of the Italian expert witnesses, and as to which I think there is no real dispute, it appears that by art. 8 of the Preliminary Dispositions of the Italian Civil Code of 1865 (1), intestate successions are regulated by the national law of the deceased. I hold that the intestate's nationality was British, and the question arises which of the systems of municipal law which are applicable to British subjects is the law applicable to the succession to the intestate's estate. Italian lawyers cannot say what is the meaning of the law of the nationality where there is more than one system of law of the nationality; but I have evidence, which I think is not disputed, from experts in Italian law that the Italian law would hold that the succession is regulated by the law of the country to which the intestate belonged, and belonged I think at the time of her death. Mr. Jopling and Mr. Denys Buckley, who appeared for the plaintiff and the first defendant who are sisters of the whole blood of the intestate, contend that the law applicable is the law of England. Mr. Wilfrid Hunt, who appears for the second and third defendants who are a brother and sister respectively of the half-blood, contends that the law applicable is the law of Eire. Ex hypothesi the intestate was not domiciled at her death in any part of the British Empire, but I find on the evidence, as I have already said, that her domicil of origin was that part of Ireland which is now Eire. Mr. Jopling and Mr. Buckley say that the law of Eire cannot be the law to be applied because by the law of Eire the intestate could not in the circumstances have been a citizen of Eire at her death, that is by reason of the Irish Free State Constitution Act of 1922, which by art. 3

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(1) [1930] 1 Ch. 377, 405.

(2) [1930] 2 Ch. 259.

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(1) Italian Civil Code, 1865. Preliminary Dispositions. Art. 8: "Succession, however, either "under an intestacy or under a "will, whether as regards the "order of succession or the "measure of the rights of succes-"sion or the intrinsic validity of "the (testamentary) depositions "is governed by the national law "of the person whose estate is in "question, and this whatever may "be the nature of the property or "the country in which it is "situate."

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of the First Schedule, states what the meaning of Irish citizenship is, and Mr. Hunt admits that the intestate was not a citizen of Eire at her death. But looking at the whole of the facts and considering the evidence of the Italian lawyers which I have before me, as to which I think there is no real doubt, I have come to the conclusion that the only part of the British Empire to which the intestate can be said to have belonged in the circumstances is the part from which she originated; and finding, as I have found, that her domicil of origin was Southern Ireland, I hold that the law now applicable to the distribution of her estate is the law of Eire applicable to a person dying intestate domiciled in Eire. I think that this conclusion is in accordance with the view expressed by Luxmoore J. (as he then was) in the case of *In re Ross* (1) and the view expressed by Maugham J. (as he then was) in the case of *In re Askew.* (2) I am interested in finding that the conclusion at which I have arrived seems to me to be that arrived at in two text books, namely, Cheshire on Private International Law, 2nd ed., at pp. 161 and 162, and Dicey's Conflict of Laws, 5th ed., at pp. 872 and 873.

The result of this conclusion is that the second question must be answered by saying that the estate of the intestate is to be distributed among the persons entitled thereto under the law of Eire; that is to say, under the law applicable to a person domiciled in the Irish Free State.

Solicitors: *Sanderson, Lee & Co.; Bennett, Ferris & Bennett; Kingsford, Dorman & Co., for Thorn Drury & Leach-Lewis, Ramsgate.*

(1) [1930] 1 Ch. 377, 406.

(2) [1930] 2 Ch. 259, 269.

A. R. Ll.-T.

# PROVENDER MILLERS (WINCHESTER), LIMITED *v.* SOUTHAMPTON COUNTY COUNCIL.

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FARWELL J.

1939 *July* 4, 5, 6, 7, 11, 12, 13, 14, 17, 18.

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*Oct.* 23, 24, 25, 26.

[1938. P. 673.]

*Water—River—Local Government—Works performed by public authority—Diminution of flow—Mill deprived of sufficient water power—Liability.*

A public authority, pursuant to their statutory duties in respect of bridges and highways, inserted a new culvert in a stream so as to give extra support to a highway passing over the stream, and did this and other work to prevent the flooding of the highway at certain times of the year. As a result of this work they diminished the natural flow of a river, thereby causing injury to the owners of a mill by preventing sufficient water to supply the necessary water power from reaching it:—

*Held* (affirming the decision of Farwell J.), (1.) that, viewed as mere riparian owners, the public authority had no defence to the claim of the owners of the mill to relief, seeing that in doing their work the public authority had altered the bed of the stream under the culvert and had entirely changed the bed of one branch of the stream, which till then had united with the other branch above the culvert.

(2.) that unless it was not practically feasible to perform their statutory obligations in any other way the authority were not entitled, by virtue of those obligations, to invade the rights of others;

(3.) that the onus of proving that their obligations could not be performed in any other manner lay on them;

(4.) that as the authority had failed to discharge this onus, the owners of the mill, who as riparian owners were entitled to the enjoyment of the natural flow of the river, should have relief by way of injunction.

The meaning of the word "negligence" as employed in cases of this class explained by Farwell J.

The explanation by Farwell J. of the observations of Lord Macnaghten in *East Fremantle Corporation* v. *Annois* [1902] A. C. 213, 217, so as to reconcile them with the statement of the law by Lord Dunedin in *Manchester Corporation* v. *Farnworth* [1930] A. C. 171, 183, approved by Clauson L.J.

WITNESS ACTION.

Provender Millers (Winchester), Ld., the plaintiffs, were millers working a mill in Winchester, known as "Wharf Mill," situate on the River Itchen, from which they derived water power. The Southampton County Council, the defendants, were the public authority responsible for the maintenance of the roads in Winchester, including bridges, having obligations and powers imposed or conferred on them by the Bridges Act, 1803, ss. 1, 2; the Highway Act, 1862, s. 17; the Highway Act, 1864, ss. 47 and 48; the Local Government Act, 1888, s. 6 and s. 11, sub-s. 1; and the Local Government Act, 1929, s. 29, sub-ss. 1 and 4. A highway or bridge known as "Broadway," crossing the Abbey Stream, which ran approximately parallel with the Itchen and was connected with it by channels at divers points, was vested in the defendants as the responsible public authority, as was also so much of the bed of the stream as lay thereunder and it was their statutory duty to do all things necessary to maintain it.

Beneath the Broadway the Abbey Stream, which above the Broadway was divided into two branches, called the Buskett Lane Stream and the Hants and Dorset Stream, was carried through a culvert. The defendants having been advised that certain works were necessary because (1.) the culvert had fallen into disrepair and there was consequently danger to the highway and (2.) in times of flood water escaped on to the highway, it proved necessary to rebuild the culvert so as to afford the road greater support and to provide an outlet for the flood water. In 1937 the defendants proceeded with the work without giving notice to any one. They removed the old culvert which had no artificial bottom and made a new culvert with proper workmanship providing a much wider channel with a cement floor. They did not alter any part of the stream outside the culvert, but they diverted the Hants and Dorset Stream by providing a new culvert parallel to the other culvert through which it passed under the Broadway and only joined the other stream immediately below the Broadway instead of immediately above it.

Till October, 1937, when the works were completed, the plaintiffs had always enjoyed a sufficient flow of water to get a head at their mill and keep the turbine working properly. In that month the flow diminished so as to be insufficient for that purpose. On investigation it was found that at a channel or connection between the Itchen above the mill and the Abbey

Stream above the Broadway water was running out of the former and into the latter, whereas it had previously flowed the other way. There was a considerable increase in the amount of water flowing down the Abbey Stream, since previously the water held up at the old culvert had formed a head which spread up the stream affecting its height and enabling water to flow from it through the channel into the Itchen.

By an action commenced on March 18, 1938, the plaintiffs sought an injunction restraining the defendants from doing any act which would reduce the flow of water down the Itchen to their mill; a mandatory order forthwith to construct all necessary works and take all necessary steps to restore the flow of water along the River Itchen to the plaintiffs' premises to what the flow was up to or would have been but for the works and acts of the defendants. They also asked for damages.

*J. M. Gover K.C.*, *Roger Turnbull* and *G. T. Hesketh* for the defendants. The defendants were bound to take measures to avoid overflowing of the stream. They did this by widening the culvert. The road and bridge are vested in them by statute. In that sense they are also the owners of the bed of the stream. The owners of land on or near a river are entitled to protect themselves from floods: see *Gerrard* v. *Crowe*. (1) Further, the old culvert was an artificial construction and the work done has only restored the natural course of the stream. The plaintiffs have no right to restrain the defendants from doing that.

This work was performed in pursuance of public rights and duties under a statute. It was done in a reasonable manner and, accordingly, the plaintiffs have no cause of action. If a statute gives a local authority power to do something and they do it without negligence, there is no right of action in respect of any damage to third parties flowing from that act: *East Fremantle Corporation* v. *Annois* (2); *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (3); *Geddis* v. *Proprietors of Bann Reservoir* (4); *Gas Light and Coke Co.* v. *Vestry of St.*

(1) [1921] 1 A. C. 395.
(2) [1902] A. C. 213, 217.
(3) (1864) L. R. 1 H. L. 93.
(4) (1878) L. R. 3 App. Cas. 430.

*Mary Abbott's, Kensington* (1); *Goldberg & Son, Ld.* v. *Liverpool Corporation* (2); *Edinburgh Water Trustees* v. *Sommerville & Son* (3); *Redler* v. *Great Western Ry. Co.* (4); *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Furnishing Co., Ld.* (5); *Edgington* v. *Swindon Corporation.* (6) The onus is on the plaintiffs to show that the work done by the defendants could have been performed in another manner not causing damage.

*Charles Harman K.C.* and *Wilfrid Hunt* for the plaintiffs. A riparian owner has the right to all the water coming down a river so far as it has not been appropriated by other riparian owners who have acquired a prescriptive right to take water for lawful purposes: *Bealey* v. *Shaw* (7); *Young (John) & Co.* v. *Bankier Distillery Co.* (8)

If in performing this work the resulting damage could have been prevented, it was negligence on the part of the defendants not to prevent it. They cannot be said to have used their best skill unless either they did the work so as to prevent the damage or there was no other way of doing it. Otherwise they were negligent within the meaning of the word as used in cases of this class, though "negligence" is not a very appropriate word to adopt: *Biscoe* v. *Great Eastern Ry. Co.* (9) [They also referred to *Metropolitan Asylum District* v. *Hill.* (10)]

If a public authority, though doing work in accordance with proper engineering principles, causes damage, even damage which could not easily be foreseen, it is still liable for that damage provided there was another way of doing the work without causing damage. Unless it can show that in practical feasibility there was no other way of performing its statutory duties save the one involving damage to third parties it is liable: *Manchester Corporation* v. *Farnworth.* (11) The onus of establishing this is on them. The defendants have not shown that damage was inevitable in the present case.

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(1) (1885) 15 Q. B. D. 1.
(2) (1900) 82 L. T. 362.
(3) (1906) 95 L. T. 217.
(4) (1907) 96 L. T. 98.
(5) [1927] A. C. 226.
(6) [1939] 1 K. B. 86.
(7) (1805) 6 East. 208, 211.
(8) [1893] A. C. 691, 698.
(9) (1873) L. R. 16 Eq. 636, 640
(10) (1881) L. R. 6 App. Cas. 193
(11) [1930] A. C. 171, 183.

FARWELL J. [having stated his findings of fact on the evidence :] The plaintiffs have suffered from a diminution in the flow of the River Itchen as a result of works which have been done by the defendant council and the problem which I have to solve is whether or not they have suffered any actionable wrong for which the defendant council are liable. The rights of a riparian owner, I think, are not really seriously in dispute. He is entitled to have all the water coming down a natural watercourse so far as it has not been appropriated under some right by other riparian owners, whether above or below. There are certain purposes for which riparian owners are entitled to use the natural water in the river, and persons may acquire prescriptive rights to use it, but, subject to any such rights, a riparian owner is entitled to have the whole natural flow of a river down its natural watercourse without any interruption at all. I think that is quite clearly the law, and plenty of authority can be found for it. Moreover, in my judgment, if that natural flow is interfered with by any person so as to affect the riparian owner, he may have resort to the Courts and is entitled, if he can establish his case, to relief by way of an injunction even though he may prove no damage, but if he does not take any steps in the matter and allows another to abstract water from the river, at the end of the necessary period that other person will have got a prescriptive right and the first riparian owner will have no remedy at all. The proof of actual damage is not a necessary ingredient in the right to relief in such an action, and once the riparian owner can show that his rights have been prejudiced by something which another person has done, then he is entitled to relief by way of injunction. Of course the extent to which he is affected must be appreciable ; the mere abstraction of a very small quantity of water might well be insufficient to entitle him to relief on the principle of de minimis. But if there is a sensible alteration in the natural flow of the water by reason of the acts of some third party, then the riparian owner is entitled to relief. Now if that be so, and assuming that I am right in saying that the defendant council have by the work they have done affected the flow

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in the River Itchen to the prejudice of the plaintiff company, then they are liable for the consequences of what they have done unless they can satisfy the Court that they are protected by some Act of Parliament which has justified them in doing that which they have done, notwithstanding that the result has been damage to third parties. If the defendants were private people there could be no question but that the plaintiffs on the facts as I have found them would be entitled to relief.

What then is the position when the defendants instead of being private persons are a statutory authority acting under statutory powers? These defendants have had imposed upon them by divers Acts of Parliament duties of maintaining and keeping up the roads in this particular district. Under this obligation so cast upon them they are bound to see that the roads are maintained in a proper condition and in that connection they must ensure that any supports of the roads are kept sufficiently in a state of repair to prevent them from subsiding or otherwise becoming unsafe. That is undoubtedly their duty and undoubtedly it is a statutory duty. The way in which they carry it out is wholly a matter for them and is not prescribed in any Act of Parliament. The Acts are silent as to the method by which any particular duty of that sort is to be done. The duty is the general one of maintaining and keeping up the road. The way in which the defendants are to set about that duty is a matter for them; they must do it in a proper way and are bound to protect, so far as is possible, the rights of third parties; that is to say, their statutory obligations do not entitle them to invade other persons' rights unless there is no way by which those duties can be performed except one which necessarily involves damage to others. There is a vast amount of authority on this matter and I have been referred to a good many of the cases, but I think the effect of all of them may be found stated by Lord Dunedin in *Manchester Corporation* v. *Farnworth.* (1) It is not necessary for me to state the facts in that case as I only refer to it for the purpose of citing the following passage in Lord Dunedin's speech: " That brings me

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(1) [1930] A. C. 171, 183.

"to say a word or two on what I conceive to be the well "settled law on such matters. The cases are numerous." He then enumerated some of them and continued: "I mention "these to show that I have carefully considered the question, "but I think it would be of no real service to analyse exactly "what was decided in each actual case." If I may, with the very greatest respect, I will adopt what the learned Law Lord there said. The fact that I have not in terms mentioned the cases does not mean that I have not carefully considered them, but I do not think that any useful end would be served by my recapitulating them to-day. I believe it is much more useful to see what is their effect in the view of one in the position of Lord Dunedin. The learned Law Lord said: "I believe their whole effect may be expressed in a very "few sentences. When Parliament has authorized a certain "thing to be made or done in a certain place, there can be "no action for nuisance caused by the making or doing of "that thing if the nuisance is the inevitable result of the "making or doing so authorized. The onus of proving that "the result is inevitable is on those who wish to escape "liability for nuisance, but the criterion of inevitability is "not what is theoretically possible but what is possible "according to the state of scientific knowledge at the time, "having also in view a certain common sense appreciation, "which cannot be rigidly defined, of practical feasibility in "view of situation and of expense." Now as I understand what is said there it is this, that when Parliament imposes upon a body of persons duties which have to be carried out it does not give them prima facie any right to invade other persons' rights. There may be cases where Parliament does authorize a particular thing to be done in a way which will lead to invasion of other parties' rights, and then it is usual, though not universal, to provide for some compensation to the persons whose rights are so invaded. But if, as in this case, Parliament imposes duties on certain persons but does not specify the time when or the method by which they are to be performed, then in the performance of them those persons have no right to invade the rights of others and such an invasion may render them liable in damages or to an injunction, unless they can show that the work done was reasonably necessary and was properly performed in all respects, and that, if it resulted in damage, there was no way of doing it which would not have had that effect. As Lord Dunedin pointed out, a council in the position of these defendants may have a good defence if the only alternative way of doing the work which can be shown is some fantastic method really quite unsuited to the object in view, although it might to some extent perform the duty prescribed. He observed that the inevitableness of the damage must be considered in the light " of scientific knowledge at the time," and of what is practically feasible. Thus there is no right in a council in the position of the defendants to shelter themselves behind the powers given to them by Parliament and to damage other persons, unless they can show not only that the work was done properly in all respects and in pursuance of their powers, but also that they could not in any reasonable way have achieved the end prescribed without doing the damage which in fact resulted.

The passage from Lord Dunedin's speech does, in my judgment, sum up the effect of the earlier cases. But a difficulty has been raised in my mind with regard to it by a judgment of the late Lord Macnaghten in a case which was decided in the Privy Council: *East Fremantle Corporation* v. *Annois*. (1) Now, any decision or dictum of Lord Macnaghten is entitled to the greatest respect. He was not in the habit of making statements in his judgments which were not carefully considered and founded upon what he believed to be the law. Therefore, when I find in a judgment of his a statement of the law as he understood it which does not seem entirely to accord with that made by Lord Dunedin I naturally pause to consider how the two passages should be reconciled. What Lord Macnaghten said was this: "The "law has been settled for the last hundred years. If persons "in the position of the appellants, acting in the execution of "a public trust and for the public benefit, do an act which

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(1) [1902] A. C. 213, 217.

"they are authorized by law to do, and do it in a proper "manner, though the act so done works a special injury to a "particular individual, the individual injured cannot maintain "an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by "Lord Kenyon and Buller J., and their view was approved "by Abbott C.J. and the Court of King's Bench. At the "same time Abbott C.J. observed that if in doing the act "authorized the trustees acted arbitrarily, carelessly, or "oppressively, the law in his opinion had provided a remedy. "Those words, 'arbitrarily, carelessly, or oppressively,' were "taken from the judgment of Gibbs C.J. in *Sutton* v. *Clarke* (1), "decided in 1815. As applied to the circumstances of a "particular case, they probably create no difficulty. When "they are used generally and at large, it is not perhaps very "easy to form a conception of their precise scope and exact "meaning. In simpler language Turner L.J. observed in a "somewhat similar case that 'such powers are at all times to "'be exercised bona fide and with judgment and discretion.' "And in a recent case, where persons acting in the execution "of a public trust were sued in respect of an injury likely to "result from their act, the present Master of the Rolls, then "Collins L.J., observed that 'the only obligation on the "'defendants was to use reasonable care to do no unnecessary "'damage to the plaintiffs.' In a word, the only question "is, has the power been exceeded? Abuse is only one form "of excess."

Now, it is to be noticed that in that case Lord Macnaghten does not use any sort of expression about the onus of proving that there was no other way of doing the work such as is to be found in the passage in Lord Dunedin's speech which I have read. But his judgment must, of course, be read like all other judgments, in the light of the particular facts in question; and I think that when one looks at the facts of that case it is quite obvious that the Legislature had authorized the actual thing which was done. That being so, unless the work was carried out improperly, the corporation could not

(1) (1815) 6 Taunt. 29.

be made liable for damage which the plaintiff in that case suffered. Lord Macnaghten was not, I think, considering cases such as this, where the power given by statute to the defendant council is a general one to do certain things without any sort of limitation upon the method in which they are to do them. In my judgment, it was not necessary for Lord Macnaghten to state the law with any greater precision than he did for the purpose of that case, and I do not think he intended the statement to be exhaustive. So far as a more exhaustive statement of the law is concerned, I think that it is to be found in the passage in Lord Dunedin's speech which I have just read.

There are cases in which it has been said that a corporation or council of this sort cannot be liable for damage to other people if it can be shown that they have done the work properly and in a reasonable way and not negligently. In *Biscoe* v. *Great Eastern Ry. Co.* (1) Wickens V.-C. many years ago pointed out that "negligence" was not a very appropriate word to use in this connection. So it seems to me, because negligence is not really what is meant when that expression is found in many of the cases. For this purpose the word "negligence" as there used means adopting a method which in fact results in damage to a third person, except in a case where there is no other way of performing the statutory duty. So that it is negligent to carry out work in a manner which results in damage unless it can be shown that that, and that only, was the way in which the duty could be performed. This, in my judgment, is the sense in which the word "negligence" is used in many of these cases.

Now in the present case, taking that as the law, can it be said that the defendant council have done this work in a way which renders them liable to the plaintiffs for the damage that they have caused them? That the work was necessary I have no doubt whatever. The evidence on behalf of the defendants has satisfied me that the highway over the bridge was in such a state that an early rebuilding of the culvert was essential. Further, I am satisfied that it was also necessary to provide a means whereby flood water could be carried

(1) L. R. 16 Eq. 636, 640.

off in order to avoid the risk of flooding on the highway. Moreover, I am completely satisfied that from a purely engineering point of view, that is apart from the injury to the plaintiffs, the work was done in a proper way, having regard to the small space in which the defendants had to work and to the other circumstances of the case. But in order to dismiss the action I have further to be satisfied, if my view as to the law is correct, that there was no other way of doing the work and in that regard the onus is on the defendants. It is true that Mr. Humphreys, one of their experts, said in the course of his evidence that what they had done was the only possible thing to do and I think that another expert called on their behalf also said something to the same effect. However, when they were cross-examined, it became quite clear that they were not saying that the work could not have been done in any other way, but that they meant that, having regard to all the circumstances, it was from an engineering point of view a proper thing to do. I have not forgotten that Mr. Floyd, another of the witnesses who were called on behalf of the defendants, said that if he had had to do the job he would not have foreseen the result which had happened. Mr. Floyd was a person of very great experience in these matters. He was a most excellent witness, who gave his evidence with the greatest candour, and I have no doubt that he was speaking the truth when he said that he did not think it would have occurred to him that the results of this work might have been what they were. It, therefore, seems hard upon the defendant council to hold them liable for something which a gentleman so experienced as Mr. Floyd would not have foreseen, and the happening of which could be established in this Court only after many days of evidence and arguments and speeches from counsel. But nevertheless, if the law be that the onus is on the defendants to show that there was no other way in which this work could be done, then in my judgment they have failed to discharge that onus. No serious attempt was made to prove, and it may be no attempt could be made to prove, that there was no practically feasible way of doing

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this work other than that which they adopted. I should point out that the method they adopted was unnecessary to this extent, that to prevent flooding, which was one of the things they desired to achieve, it was unnecessary to widen or increase the space in the culvert itself so long as they made some provision to carry off the extra water in times of flood. However that may be, the position, in my judgment, is this. The plaintiffs have shown that their rights have been prejudicially affected by the diminution of the flow of water which reaches their mill to an appreciable extent, and that, therefore, they are entitled to relief in this Court because their rights as riparian owners have been invaded. That state of affairs has been brought about, in my judgment, by the action of the defendant council, acting in pursuance of a statutory duty laid upon them. No doubt they did their best to carry out their duty in a proper way, but the fact that they have been unable to show the Court that they could not have performed it in any other way—the absence of evidence as to that—prevents them from sheltering behind any Act of Parliament as a protection against the plaintiffs' claim in this case.

I should add this, and I desire to impress upon the defendant council and other persons in a similar position the desirability from their own point of view, as well as from that of other persons, of giving notice by advertisement or otherwise of any such work which they are proposing to do, even in comparatively small matters, and if possible having plans available, so that people who think they are going to suffer damage as a result may be able to intervene before expense has been incurred in carrying out the work in question, and thus possibly avoid such an action as this Court has had to consider during the last ten days.

The injunction asked for was granted and liberty given to apply for a mandatory order.

F. H. C.

The defendants appealed. The appeal was heard on October 23, 24, 25, 26, 1939.

*J. M. Gover K.C.*, *Roger Turnbull* and *G. T. Hesketh* for the appellants, substantially repeated their arguments in the Court below and referred to the following additional authorities: *Baily & Co.* v. *Clark, Son and Morland* (1), *Mason* v. *Shrewsbury and Hereford Railway Co.* (2) and *Great Central Railway Co.* v. *Hewlett.* (3)

*Charles Harman K.C.* and *Wilfrid Hunt* for the respondents were not called upon.

SIR WILFRID GREENE M.R. The facts of this case are stated with great care and in full detail by the learned judge and I do not propose to take up time in repeating them. The matter comes before us on questions of law alone since the finding of the learned judge as to the effect of the appellants' works on the water flowing to the respondents' mill is not disputed.

The points that were taken before us fall into two categories. The first category deals with the matter apart from any statutory rights or duties, and the second category deals with the matter in the light of the statutory obligations and the statutory powers which the appellants admittedly have. I must say a word or two about both these matters. I shall say a little more about the first than about the second because with regard to the first the learned judge has not gone into details of the argument but merely rejected it. In my opinion he rightly rejected that branch of the argument. Before I come to deal with it there is one matter on which I should say a word or two. The case made out in the statement of claim with regard to the nature of the Abbey Mill Stream was that it was a natural stream. In the defence that allegation was contested and it was asserted that it was an artificial stream. The respondents, who were the plaintiffs below, certainly at one stage in the case quite definitely accepted the view that the stream was an artificial one, and that acceptance was not commented upon, so far as I understand, in any way by counsel for the present appellants for the

(1) [1902] 1 Ch. 649.
(2) (1871) L. R. 6 Q. B. 578.
(3) [1916] 2 A. C. 511.

very good reason that on the case that he was presenting to the Court it was quite immaterial whether the stream was artificial or natural. He was not putting before the Court an alternative argument based on the view, which in any case would have been inconsistent with his pleading, that the stream was a natural one. At one time I thought the question whether or not the stream was a natural one or an artificial one might be a matter of importance, but I am now satisfied that the answer to this branch of the appellants' argument is the same on either hypothesis.

The argument is broadly of this nature. The appellants are treated, and I think for this purpose may properly be treated, as riparian owners, and it is said, first, that as riparian owners they are entitled to protect themselves against the flooding of their land and that the work which they have carried out is that of protecting their land from flood water. Secondly, it is that apart from the question of flooding, every riparian owner, whether the stream be artificial or whether it be natural, is entitled to remove an artificial obstruction which is placed in the watercourse. In the case of an artificial stream, of course, that must be subject to this, that the right to the water in an artificial stream depends either upon the scope of the grant or the quantity of water which has in fact been enjoyed during a period of prescription, and that the removal of any obstruction can only be carried out if it does not give to the person concerned a greater flow of water than that which he is entitled to. Subject to that qualification I am prepared to accept the proposition that an artificial obstruction can properly be removed.

Looking at the matter from the point of view of protection against flood, the first point is that what the defendants have done is something far more than protecting themselves against flood. That is the point which comes into prominence very particularly in dealing with the second category of argument which was presented, because there it becomes of great materiality. It is sufficient in this context to say that assuming the appellants are entitled to protect themselves against flooding, that does not mean that they are entitled to execute works which not merely protect them against flooding, but increase the daily flow of water in the watercourse to the prejudice of another person who has interests in the water. That applies to every stream, whether it be natural or whether it be artificial, and, as will appear later, the appellants have entirely failed to show that for the purpose of protecting themselves against flooding it was necessary to effect a permanent diminution in the quantity of water going to the respondents' mill. That reason alone appears to me to dispose of that particular argument, but there is another reason which is equally cogent to my mind. It is that accepting the proposition that a riparian owner, whether on a natural or an artificial stream, is entitled to protect himself against flooding, his right in that respect does not extend, and no authority was cited which suggests that it possibly could extend, to an alteration in the alveus of the stream, at any rate, an alteration which affects the normal flow. True it is that the building of walls and embankments may be legitimate in protecting land against floods even if the effect of building them is to throw flood water on to your neighbour's land; but the one thing which the authorities appear to make quite clear is that in carrying out works of protection it is not legitimate to alter the alveus of the stream. Now what has been done here is precisely that. The appellants have not only increased the size of the alveus of that portion of the stream which comes down from Buskett Lane, but they have made an entirely new alveus to carry the water of the Hants and Dorset Stream, which had previously run into the Buskett Lane Stream towards the north side of the Broadway. That water is now carried by a new and separate culvert parallel to the culvert carrying the Buskett Lane water into the Abbey Mill Stream on the south side of the Broadway. That, as I have said, is an entirely new alveus made where, so far as the evidence goes, no water had ever flowed before, and having the effect not merely of protecting the appellants' land from flooding but also of performing a function which goes far beyond that and was unnecessary for that purpose—namely of permanently diminishing the flow of water in the main stream of the River Itchen. Now whether the stream be natural or whether it be artificial it appears to me that what the appellants have done cannot be justified on any principle of law which entitles riparian owners to protect themselves against flooding.

Then it is said that what they have done is to remove an artificial obstruction which in fact interfered with the natural flow of the water in those two branches of the Abbey Mill Stream. If the stream be an artificial stream there is no evidence that the watercourse was at any stage larger than it was before the old culvert was constructed. So far as any evidence goes the culvert, or something of the same dimensions, may have been there all along, and if the stream was an artificial one, of course, the measure of the water rights would be determined by the capacity of the artificial work. Therefore, if it be an artificial stream, I could not accept the proposition that the so-called removal of obstruction would be legitimate in the absence of proof that that was an obstruction which interfered with the water rights of those interested in the artificial stream. If the stream be a natural stream again there is no evidence as to what the dimensions of that natural stream were before the culvert, or some previous work, was made. It may be that the stream at that point was a narrow stream and did not allow the water to pass freely. Mr. Gover invited us to speculate as to what the situation might have been in remote antiquity, but there is no evidence about it and I do not think it would be legitimate for this Court to draw any inferences as to what the natural bed of the stream, if it were natural at that point, was before the culvert was built. I put that aside because in my view it is not necessary to enter into that question in view of the circumstance that what the appellants have done cannot with any accuracy of language be described as the removal of an obstruction. This is not like a case where the piers of a bridge in a river have been removed and a new bridge with a single span and no piers have been thrown across the river, as Mr. Gover suggested that it was. It is something of a quite different character. No doubt the construction which covered the watercourse was technically a bridge. In point of fact, from another and perhaps more accurate physical point of view, there was merely a covered watercourse. What they have done, as I have already said, is not merely to substitute a new cover of that watercourse for the old one, but they have made a new watercourse in the way that I have already described. That, in my judgment, cannot by any stretch of language be described as the removal of an obstruction in a watercourse; it is something of quite a different character.

I have dealt at some length with this branch of the argument in deference to what was put before us by Mr. Gover, and particularly in view of the fact that the learned judge did not accept it and did not give reasons for taking that course. In my judgment, he was right in taking the course that he did and if he did not go fully into the matter it was no doubt for the reason, with which I entirely sympathize, that the argument when developed will not really bear examination.

The other branch of the argument dealt with the point of statutory duty. It was suggested that the learned judge had misdirected himself and that he had taken a view of the evidence which could not be supported. On this branch of the case, without attempting to put my language with exact precision, the position may be stated thus: the appellants being under a statutory duty to repair bridges carried by county highways and to keep the county highways in repair, and in particular to protect them against flooding, set themselves to perform that task which was admittedly necessary. That being the task, what they have actually done is something beyond what their duty imposed upon them, because they have not only rebuilt the bridge—that is right; they have not only protected the highway against flood water—that is right; but they have gone further and effected a permanent alteration in the natural flow of the stream. They having, therefore, done something which goes beyond their duty, it is for them, and admittedly it is for them, to justify that excess. If the statutory duty could

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only have been performed (and when I say that I mean from a reasonable point of view and without calling in the aid of extravagant devices or anything of that kind) by going to that excess, the appellants would have been under no liability, because then they could truly have said that what they had done was the only reasonable thing that they could have done in the performance of their duty, and that if in order to perform that duty they had at the same time to go beyond its exact limits that would be a matter of which the respondents could not complain. The learned judge, in my opinion, correctly stated the law and appreciated the facts correctly. He found that the appellants had really made no attempt to discharge the burden upon them of showing that the statutory object of repairing the bridge and protecting the highway against flooding could not reasonably have been achieved without going to the further point of permanently altering the normal flow of the river to the prejudice of persons interested in the water flowing down the River Itchen. If any complaint could be made against the learned judge's judgment on this part of the case, speaking for myself, I should have thought it would be that he had not really put the matter high enough. I say this because not merely was no real attempt made to prove that point, but it seems to me that the evidence of the experts, when properly considered, shows that it would have been possible and easy so to lay out the work as to afford the requisite protection against flood water without at the same time affecting the normal flow in normal times. The real fact of the matter was, as the learned judge points out, that the existence of any such problem was never present to the minds of those concerned with the preparation and execution of this work. It never occurred to them that in carrying out the work they must consider whether or not it would alter the flow of water in the River Itchen going to the respondents' mill or whether that could be avoided without at the same time interfering with the legitimate work required for protecting the highway against flooding. They never thought that such a problem existed and accordingly they never set their minds to the solution of it; and when the evidence came to be given it was evidence which I must confess would have satisfied me, not merely that the burden of proof had not been discharged, but that the contrary was established. However, it is not necessary to go as far as that. The learned judge not being satisfied that the burden had been discharged quite rightly took the view that the appellants on this argument were in the wrong.

I do not think that there is any other matter to which I need refer. Certain authorities were referred to and the fact that I do not mention them or examine them does not mean that I did not very carefully attend to them when they were being read. In my judgment they do not assist the arguments put forward by the appellants nor do they in any way impugn the statements of law contained in the judgment of the learned judge The appeal fails and must be dismissed with costs.

CLAUSON L.J. I agree with the judgment which has been just delivered by the Master of the Rolls. In this Court we have pursued the matter on the footing that the case may properly be examined on the two alternative views, one that the Abbey Stream was an artificial stream and the other that it is a natural stream. The learned judge in the Court below based his judgment upon the view that the stream was an artificial stream and I would merely say this, that I think in view of the form of the pleadings and of the way the case was debated the learned judge was quite within his rights in treating it as common ground that the stream was artificial, and dealing with it on that footing. As the Master of the Rolls has explained, and I am in entire agreement with him, as a matter of law the difference in the present case does not appear to be material.

It was suggested in the Court below that there was some inconsistency between the statement of the law by Lord Macnaghten in the case of *East Fremantle Corporation* v. *Annois* (1) in the Privy Council, and the statement of the law by Lord Dunedin in *Manchester Corporation* v. *Farnworth* (2) in the House of Lords. In my view there is no inconsistency in those two statements. Lord Macnaghten was dealing with a case which did not involve considering the proposition which was fully stated by Lord Dunedin in *Manchester Corporation* v. *Farnworth.* (1) I agree entirely in the view of the law in this regard, so carefully expressed by Farwell J. in the Court below.

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(1) [1902] A. C. 213, 217.

(2) [1930] A. C. 171, 183.

GODDARD L.J. I agree and do not desire to add anything.

*Appeal dismissed.*

Solicitors: *Robbins, Olivey & Lake, for F. V. Barber, Winchester; Sharpe, Pritchard & Co., for Bell, Pope, Bridgwater & Hughes, Southampton.*

H. C. G.

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(1) [1930] A. C. 171, 183.

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## *In re* CAPON.

## *Ex parte* THE TRUSTEE IN BANKRUPTCY *v.* R. C. KNIGHT AND SONS.

## SAME *v.* WOODWARD AND WOODWARD.

[No. 4 of 1938.]

*Bankruptcy—Pigs purchased at auction—Agreement between purchaser and auctioneers—Purchase price provided by auctioneers—Note signed by purchaser—Statement that pigs were property of auctioneers—Bankruptcy of purchaser—Property in pigs—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 17, *sub-s.* 1. (1)

A farmer having from time to time bid at auction sales for pigs which were knocked down to him but for which he was not in a position to pay, received a bought note in the ordinary form, but also signed a note addressed to the auctioneers, who provided the purchase-money, stating therein that he agreed " to feed and see " after " the pigs for them and acknowledged that they were the property of the auctioneers who might remove them at any time. On any resales of the pigs he repaid the auctioneers their purchase price out of the proceeds of sale and they credited themselves with the usual auctioneers' commission if the resales were made at their auctions, or received 5 per cent. of the proceeds of sale in lieu of commission if the sales were made elsewhere. The day before the farmer executed a deed of assignment for the benefit of his creditors the auctioneers forcibly and without his consent removed the pigs at his farm. He was subsequently adjudicated bankrupt:—

*Held,* (1.) that s. 17, sub-s. 1, of the Sale of Goods Act, 1893, did not operate to prevent the property in the pigs being transferred to the farmer, since it had reference to the contract between the vendors and the purchaser and those vendors, who knew nothing of any arrangement between him and the auctioneers, intended the property to pass to him as purchaser; (2.) that the arrangement between the farmer and the auctioneers did not constitute him their agent, but was intended to give them a charge on the pigs to secure the amount advanced, and that any such charge, not having been registered as a bill of sale, was void as against the trustee in bankruptcy; (3.) that, accordingly, the property in the pigs was in the farmer and they were part of the assets in his bankruptcy.

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(1) By the Sale of Goods Act, 1893, s. 17, sub-s. 1: " Where "there is a contract for the sale "of specific or ascertained goods "the property in them is trans-"ferred to the buyer at such time "as the parties to the contract "intend it to be transferred."

APPEAL from Ipswich County Court.

Harry Urban Capon (hereinafter called "the bankrupt") was a farmer in Suffolk. Between 1934 and 1938 he acquired from time to time various lots of pigs at auction sales held regularly by R. C. Knight & Sons and Woodward and Woodward (hereinafter called "the respondents"), two firms of auctioneers. The bankrupt was not in a position to pay for pigs which he bought. The transactions were carried out under arrangements made between himself and the respondents whereby if the pigs were knocked down to him he received a bought note in the usual form. The respondents themselves provided the purchase-money. Before the bankrupt removed the pigs he signed a note addressed to the respondents. The following was typical of the notes so signed: "Received of "Messrs. Woodward & Woodward, auctioneers, . . . . 36 "feeding pigs costing £134 4*s*., which I agree to feed and see "after for the said Woodward & Woodward. I acknowledge "that these pigs are their property and may be removed by "them at any time." The pigs were taken by the bankrupt to his farm and were fattened and then resold, and the respondents were repaid out of the proceeds of sale the moneys which they had advanced. The resales were for the most part at auctions held by the respondents at whose auctions the pigs had originally been purchased. In that case the respondents credited themselves with the usual auctioneers' commission. If the pigs were sold elsewhere the bankrupt paid the respondents 5 per cent. on the purchase price in lieu of commission.

On February 24, 1938, the bankrupt executed a deed of assignment for the benefit of his creditors. On March 14, 1938, a receiving order was made against him. On March 18, 1938, he was adjudicated bankrupt, and James Benjamin Sanderson (hereinafter called "the trustee") was appointed trustee in bankruptcy.

Immediately before the execution of the deed of assignment the bankrupt had about six hundred pigs on his farm. On February 23, and 24, 1938, the respondents, without the bankrupt's consent, forcibly entered the farm and removed the pigs, which they subsequently sold.

By two motions consolidated on April 5, 1939, the trustee sought a declaration that at the commencement of the bankruptcy the pigs were the property of the bankrupt and that their seizure was wrongful. He also sought an order that the respondents should pay him 4408*l.* 2*s.* 3*d.*, the proceeds of sale. His Honour Judge Hildesley K.C. dismissed the motions. The trustee appealed.

*Charles Harman* K.C. and *C. Henderson* for the appellant. The pigs were the bankrupt's property and the taking of them was a mere act of conversion. The judge was wrong in the conclusion he drew from the Sale of Goods Act, 1893, s. 17, sub-s. 1. He misdirected himself in considering who were the parties to the transaction, the vendors and the purchaser. So far as the vendors, the original owners of the pigs, were concerned, there was no sale or pretended sale to the auctioneers. In their arrangements with the bankrupt the auctioneers were making an ineffectual attempt to get security for the money they had advanced. The pigs never became their property, but remained the property of the bankrupt, so that the seizure was wrongful. If the property in the pigs had passed to them the situation on the resales would have been that the auctioneers were charging commission on the sale of their own pigs.

*J. B. Blagden* for the respondents. The answer to the question whether or not the property passed to the bankrupt depends on the intention of the parties. The intention was that it should not pass: see Sale of Goods Act, 1893, s. 17, sub-s. 1. The effect of the arrangements was that the bankrupt received the pigs on agistment. The auctioneers, having paid for them, the bankrupt was to pay the auctioneers when he decided that they should be sold. Till then the property remained in the auctioneers and the bankrupt acted as agent for them each time he bought pigs at the auctions. These were the judge's findings of fact and as such they cannot be the subject of appeal. The auctioneers were entitled to take the pigs from the farm and the proceeds of sale belong to them.

*Cur. adv. vult.*

1939. Nov. 20. The Court (Farwell and Morton JJ.) allowed the appeal, Farwell J. delivering the judgment of the Court.

FARWELL J. [having stated the facts:] The learned county court judge accepted the respondents' contention and the question which we have to determine is whether that decision was correct. It is not open to this Court to review the facts as found by the county court judge, but so far as his decision rests upon inferences to be drawn from the facts and documents in the case, this Court may draw inferences other than those drawn by him. In the present case, as we understand it, the learned judge's decision rests wholly upon the inferences which he thought should be drawn from the facts and the documents, and it is therefore open to us to review it.

In our judgment, the decision of the learned judge is erroneous. The arrangements between the bankrupt and the respondents were in each case for all practical purposes the same although the language of the documents differs somewhat and they were treated by the learned judge in the Court below as being on the same footing in all respects. The learned judge appears to have taken the view that when the bankrupt bid at various sales for pigs he did so as agent for the auctioneers in each case and that when the pigs were knocked down to him the property in them passed to the auctioneers and not to the bankrupt. The learned judge referred to s. 17, sub-s. 1, of the Sale of Goods Act, 1893, which provides that the property shall be transferred "at "such time as the parties to the contract intend it to be "transferred" and then he said that the evidence taken as a whole negatived an intention to transfer the property to the bankrupt. In our judgment, this is a misconception of the meaning of that sub-section. The contract there referred to is the contract for sale between the vendor and the purchaser. In the present case it has never been suggested by anyone that the original vendors knew anything whatever of any arrangement between the bankrupt and the auctioneer. The only parties to the contract so far as the vendors were concerned were the vendors themselves and the bankrupt. The vendors clearly intended that the property in the goods when sold should pass to the bankrupt and as between them there can in our judgment be no doubt but that as the result of the auction sales the property in the goods passed to the bankrupt. If he was in fact the agent of the auctioneers, he may have acquired the property as trustee for them, but as between himself and the vendors the property in the pigs passed to him. As we understand the judgment of the learned county court judge, his decision is based on what is, in our view, a misconception of the effect of the Sale of Goods Act, because he considered that the result of the arrangements made between the bankrupt and the auctioneers was that the property in the pigs passed to the auctioneers and remained in them so that the pigs were their property and they were entitled to deal with them as they thought fit. If, however, the true view be that the property in the pigs passed to the bankrupt and was never in the auctioneers, then the whole basis of the decision goes. In our judgment the result of the auction sales was that the property in the pigs passed to the bankrupt and whatever may have been the result of the arrangements between the bankrupt and the auctioneers, they never operated to pass the property in the goods to the auctioneers. The arrangements in question appear from the correspondence. They are extremely equivocal and open to more than one interpretation, but in our judgment the arrangements did not constitute the bankrupt the auctioneers' agent, but were intended to give the auctioneers some charge on the pigs to secure the moneys which they advanced from time to time. Any such charge not being registered as a bill of sale is admittedly invalid as against the appellant and consequently in our judgment the pigs on the farm on February

23 and 24, 1938, were the property of the bankrupt and became part of his assets in the bankruptcy, with the result that the respondents were not entitled to seize or sell them, and they must accordingly account to the appellant for the proceeds of sale.

In our judgment, the appeal should be allowed and the respondents ordered to pay the appellant the proceeds of sale of the pigs, together with the costs here and below.

Solicitors: *Herbert Smith, for Westhorp, Cobbold & Ward, Ipswich; Field, Roscoe & Co., for Gotelee & Goldsmith, Ipswich.*

F. H. C.

# *In re* A DEBTOR.

[No. 13 of 1939.]

FARWELL
AND
MORTON
JJ.

1939
Dec. 11.

*Bankruptcy—Bankruptcy notice served on debtor before war—Notice not complied with—Outbreak of war—Subsequent difficulty in realizing property—Effect—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 5.

By the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 5: "Where a bankruptcy petition has been presented against any "debtor, or a winding-up petition has been presented against any "company on the ground that it is unable to pay its debts, and "the debtor or company proves to the satisfaction of the Court "having jurisdiction in the bankruptcy or winding-up that his "or its inability to pay his or its debts is due to circumstances "directly or indirectly attributable to any war in which His "Majesty is engaged, the Court may at any time stay the "proceedings under the petition for such time and subject to such "conditions as the Court thinks fit."

Where a bankruptcy notice has been served on a debtor and has not been complied with before the outbreak of war, it is irrelevant to show, on the hearing of a bankruptcy petition presented by the creditor, that the war has prevented sales of property which would have enabled the debtor to discharge the debt in question, since the inability to pay debts referred to in s. 1, sub-s. 5, must be one which existed at the time when the debtor failed to comply with the bankruptcy notice.

APPEAL from Great Yarmouth County Court.

On April 20, 1939, Parkfield Trust (1935), Ld. (hereinafter called " the creditors "), who were registered moneylenders, issued a bankruptcy notice in respect of a judgment debt of 140*l.*, due from the debtor. The notice was served on the debtor on May 20, 1939, and was not complied with. On July 5, 1939, the creditors presented a bankruptcy petition in Great Yarmouth County Court. It came on for hearing on September 4, 1939, the day after Great Britain had declared war on Germany, but the matter was adjourned. On October 9, 1939, the matter was further adjourned for the purpose of enabling the debtor to file evidence to show that her inability to pay her debts was due directly or indirectly to the war. From the evidence it appeared that under a tenancy agreement dated January 11, 1937, she had an option to purchase for 2150*l.* a house called Ashman's Hall, in Suffolk, with an estate of about 37 acres. On October 24, 1938, she had exercised that option, but she had never completed. In July, 1939, she had entered into negotiations with one Colonel Lynn, who had subsequently entered into a contract to purchase the property. But on the outbreak of war he had been recalled to India and the purchase had not been completed. Other attempts to sell the property had since proved unsuccessful. On October 23, 1939, the Registrar made a receiving order, having refused to stay the proceedings under s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1939. The debtor appealed.

*B. M. Cloutman* for the appellant. The relevant provision of the Courts (Emergency Powers) Act, 1939, is s. 1, sub-s. 5. The effect of s. 1 was considered in *A.* v. *B.* (1), where it was held that each case must be decided on its own merits. In this case the evidence is that the debtor owns a substantial asset which she is unable to realize owing to the war. It is worth more than the total amount of her debts. The Court should hold that this is a proper case for the staying of the proceedings under s. 1, sub-s. 5.

*L. Caplan* for the respondents. For the discretion of the Registrar to arise in such a case as this the debtor must show that he is unable to pay his debts by reason of the war. The debtor in this case did not discharge the onus of proof and accordingly the discretion of the Registrar did not arise at all. The evidence filed on her behalf did not convey her real position or show her total assets and liabilities. Moreover, since it was before the outbreak of war that she failed to comply with the bankruptcy notice, her position after it is irrelevant under s. 1, sub-s. 5.

FARWELL J [having stated the facts :] In those circumstances the learned Registrar refused to grant a stay of proceedings under s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1939, and this Court is now asked to say that the

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(1) [1940] 1 K. B. 217.

FARWELL AND MORTON JJ.

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A DEBTOR, *In re.*

discretion which was undoubtedly in him either to grant a stay or refuse it has been wrongly exercised. In my judgment, the learned Registrar exercised his discretion perfectly properly. The petitioning creditors are registered money-lenders and their debt is in respect of money lent. The notice was served on the debtor in May of this year and she failed to comply with it; accordingly she was at that date unable to pay her debts and that inability was not and could not be suggested to be in any way the result, directly or indirectly, of the war. The lady says that now, owing to the war, she has been unable to sell this property of which she is the owner in equity, but that, if the war had not prevented a prospective purchaser from completing the purchase of it in September or October, she would then have been in a position to pay her debts. In my judgment, on those facts, there is no ground for staying the proceedings. The inability to pay the debts was one which arose, in this case, at a time when the debtor was unable to comply with the bankruptcy notice. She was then unable to pay her debts, and that was in no sense due to the war. The fact that she has since found difficulty in realizing the property the sale of which might have enabled her (although, on the evidence before us, that is by no means certain) to satisfy the judgment creditor at a later date seems to me to be an irrelevant consideration. Apart from that altogether, the onus is undoubtedly upon the lady to prove that her inability to pay her debts is due to the war, directly or indirectly. In my judgment she has failed to discharge the onus that lies upon her, and, therefore, I think the learned Registrar exercised his discretion rightly in this case and the appeal must be dismissed with costs.

MORTON J. I agree.

Solicitors: *Drake, Son & Parton; Philip Goodenday & Co.*

F. C.

FARWELL J.

1939
Nov. 29.

## CARPENTERS ESTATES, LIMITED *v.* DAVIES.

[1938. C. 3882.]

*Covenant—Sale of land—Vendor covenanting to do certain works on adjoining land retained—Breach of covenant—Specific performance.*

A vendor who sold certain land to purchasers for building development, retaining other land adjoining it, covenanted to make certain roads and lay certain mains, sewers and drains on the land retained. The covenant having been broken, the purchasers brought an action for specific performance:—

*Held,* (1.) that the fact that a person undertaking work under a building contract had not thereby obtained possession of the land on which the work was to be done was not necessarily a bar to specific performance, which might be granted if he had contracted to do work on his own land in consideration of the purchase price of other land belonging to him.

Statement of Romer L.J. in *Wolverhampton Corporation* v. *Emmons* [1901] 1 K. B. 515, 524 expanded.

(2.) that in the present case there should be an order for specific performance as that constituted the only adequate remedy and the work to be done was sufficiently clearly defined.

WITNESS ACTION.

By a transfer dated September 25, 1937, Edith Mable Davies (hereinafter called "the defendant") with the concurrence of a mortgagee transferred in fee simple to Carpenters Estates, Ld. (hereinafter called "the plaintiffs"), a piece of land at Loughton in Essex for building development, together with a right of way for the plaintiffs, their successors in title and all other persons authorized by them over all roads and footways on certain adjoining land retained by the defendant, known as the "Church Hill Estate," and full and free right for the plaintiffs and their successors in title to connect up with and use all sewers, drains, pipes, watercourses, and gas, electric and water mains then or thereafter laid in, under and over the roads and footways on the Church Hill Estate. By the transfer the defendant covenanted with the plaintiffs that she would at her own expense and free of all cost to the plaintiffs completely finish the accommodation roadways (including channelling, kerbing, sewering, paving and lighting) between the land transferred and the public highways, in accordance with the Town Planning Scheme requiring the accommodation roadways, to the satisfaction of the local or other authority, and lay all necessary main sewers, drains, and electric, gas and water mains thereunder and, further, that she would lay and connect a main sewer to enable the plaintiffs to connect the drains and sewers from the buildings to be erected on the land transferred at a point indicated on the plans annexed to the transfer on which the roads and sewers referred to were delineated. The works were to be properly completed within three months of the date of the transfer.

The defendant partly concreted and kerbed the accommodation roadways and laid the hard core foundation thereof, but did not finish them with tarmac as required by the local authority. She did not make the sewers. On November 14, 1938, the plaintiffs began an action claiming specific performance of the covenants and damages in addition to or in lieu thereof. They had not erected any houses or shops.

*S. Shaw* for the defendant. The Court cannot order specific performance in this case. To obtain specific performance of a building contract the plaintiff has to show "that the "defendant has by the contract obtained possession of land "on which the work is contracted to be done": *Wolverhampton Corporation* v. *Emmons* (1); Fry on Specific Performance, 6th ed., p. 48. In this case the land on which the work was to be done was already the defendant's.

*M. G. Hewins* and *R. Walton* for the plaintiffs. For the plaintiffs to obtain specific performance it is not essential that the defendant should have obtained possession of the land on which the work was to be done by virtue of the contract. It is sufficient if the defendant has contracted to do the work on her own land in consideration of the purchase price of other land belonging to her. The statement of Romer L.J. in *Wolverhampton Corporation* v. *Emmons* (1) is not exhaustive: *Storer* v. *Great Western Ry.* (2); *Greene* v. *West Cheshire Ry. Co.* (3)

(1) [1901] 1 K. B. 515, 524.
(2) (1842) 2 Y. & C. C. C. 48.
(3) (1871) L. R. 13 Eq. 44.

FARWELL J.

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FARWELL J. [having stated the facts:] There can be no doubt that the defendant has committed a breach of the covenant which she entered into by the transfer of September 25, 1937. In those circumstances, two questions arise, first, whether this is a case in which the plaintiffs are entitled to an order for specific performance, and secondly, whether they are entitled to damages, and if so, what is the measure of damage.

With regard to the first question, it is true to say that generally speaking this Court does not grant specific performance of a contract to build. The matter has been considered in various authorities, and one of them to which I have been referred is the case *Wolverhampton Corporation* v. *Emmons*. (1) The headnote of that case is as follows: "The plaintiffs, an "urban sanitary authority, in pursuance of a scheme of street "improvement, sold and conveyed to the defendant a plot of "land abutting on a street, the defendant covenanting with "them that he would erect buildings thereon within a certain "time. The nature of the buildings to be erected was not "precisely specified by the covenant, but subsequently, in "consideration of the plaintiffs giving the defendant further "time for performance of his obligation to erect buildings, he "agreed to erect on the land eight houses in accordance with "certain plans, submitted by him to, and approved by the "plaintiffs, which definitely showed the nature and particulars "of the houses to be erected. The defendant failing to perform "this last-mentioned agreement, the plaintiffs brought an "action against him claiming specific performance:—*Held*, "that the case came within the class of cases which has been "recognised by the Courts as forming an exception to the "general rule that specific performance of a building contract "will not be ordered, and that an order ought to be made "against the defendant for specific performance of his "contract . . . ." In that case A. L. Smith M.R. said (2): "The authorities to which reference has been made appear to "me to show that, where there is a definite contract, by which "a person, who has acquired land in consideration thereof, "has agreed to erect on the land so acquired a building, of

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(1) [1901] 1 K. B. 515.

(2) Ibid. 522.

"which the particulars are clearly specified, and the erection "of which is of an importance to the other party which "cannot adequately be measured by pecuniary damages, "that is a case in which, according to the doctrine acted upon "by Courts of Equity in relation to such matters, specific "performance ought to be ordered. If a man has contracted "to build a house on a piece of land according to certain "detailed plans, and has obtained a conveyance of the land "on the terms that he will do so, why should he be allowed "to turn round and refuse to perform that contract, especially "where damages will not compensate the person with whom "he has contracted? In the judgment of Kay L.J. in *Ryan* "v. *Mutual Tontine Westminster Chambers Association* (1), "after stating that ordinarily the Court will not enforce "specific performance of building works because damages are "generally in such cases an adequate remedy, and the Court "cannot superintend such works—of which last objection I "have never seen the force—he said: 'An exception to this "' rule has been established in cases where a railway company "' has taken lands from a landowner on the terms that it will "' carry out certain works.' Here the defendant has taken "land from the plaintiffs on the terms that he will erect "buildings. The learned Lord Justice proceeded: 'In those "' cases, because damages are not an adequate remedy, the "' Court has gone to great lengths, and has granted specific "' performance of the definite works—they must be definite "' works—which the company that has taken the lands has "' contracted to do.' In the present case I agree with the "learned judge that, though the original covenant did not "specify the buildings to be erected, the plans referred to by "the subsequent agreement define the work to be done "sufficiently to enable the Court to make an order for specific "performance." Accordingly, the appeal in that case was dismissed, Wills J. having granted specific performance. Collins L.J. agreed with the Master of the Rolls, and I do not think there is anything in his judgment to which I need refer, but I must consider the judgment of Romer L.J. who also

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(1) [1893] 1 Ch. 116, 128.

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agreed that the decision of Wills J. should be affirmed. At the beginning of his judgment he stated the question in this way (1): "The question, which is not free from difficulty, "is whether, under the circumstances of this case, an order "for specific performance should be made in favour of the "plaintiffs. There is no doubt that as a general rule the "Court will not enforce specific performance of a building "contract, but an exception from the rule has been recognised. "It has, I think, for some time been held that, in order to "bring himself within that exception, a plaintiff must establish "three things.① The first is that the building work, of which "he seeks to enforce the performance, is defined by the "contract; that is to say, that the particulars of the work "are so far definitely ascertained that the Court can sufficiently "see what is the exact nature of the work of which it is asked "to order the performance.② The second is that the plaintiff "has a substantial interest in having the contract performed, "which is of such a nature that he cannot adequately be "compensated for breach of the contract by damages.③ The "third is that the defendant has by the contract obtained "possession of land on which the work is contracted to be "done. The rule on this subject is stated by Fry L.J. in his "work on Specific Performance, 3rd ed., pp. 44, 45, in substantially the same terms as those in which I have just "stated it." Then he proceeded to consider whether the plaintiff in the case before him had brought himself within the exception.

The only exception which, with great respect, I venture to take to what the learned Lord Justice there said is in respect of his statement that the third matter which it is necessary for the plaintiff to establish to bring himself within the exception is "that the defendant has by the contract obtained "possession of land on which the work is contracted to be "done." I would rather put it in this way, that what the plaintiff has to establish ③ is that the defendant is in possession of the land on which the work is contracted to be done. Obviously, if the defendant is not in possession of the land, it

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(1) [1901] 1 K. B. 515, 524.

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may be impossible for him to carry out the contract, and, of course, in such a case as that the Court would not grant specific performance. But if, as in the present case, the defendant is in possession of the land, and there is no difficulty about her carrying out the obligation under which she has put herself and if the other two requirements are satisfied, namely, that the particulars of the work are sufficiently clear and defined and that it is a case in which the plaintiff has a substantial interest in having the contract performed which cannot be adequately compensated for by damages; in such a case as this, the Court can in my judgment, grant specific performance. That seems to me to be in accordance with what has been decided in other cases, such as *Fortescue* v. *Lostwithiel and Fowey Ry. Co.* (1) where the Court has seen fit to grant specific performance.

I think that this portion of the judgment of Romer L.J. is perhaps too widely stated so far as the last requirement is concerned. In my view it is not necessarily a complete bar to the granting of specific performance that the defendant has not obtained by the contract possession of the land on which the work is to be done. In the present case the defendant has contracted to do the work on her own land in consideration of the purchase price of other land belonging to her, and if the other two conditions are fulfilled, I am unable to see why the Court should be debarred from granting relief by way of specific performance. I am not prepared to accept the statement of Romer L.J. as completely exhaustive so as to prevent my granting specific performance if I think it right to do so in the present case.

Now, the nature of the work which the defendant has undertaken to do seems to me in this case to be sufficiently clearly defined. She must completely finish accommodation roads which are clearly defined in the plan attached to the transfer and must construct certain sewers and drains which are also defined in the contract. That has to be done within three months to the requirements and satisfaction of the local or other authority. In my judgment there is nothing whatever

(1) [1894] 3 Ch. 621.

in the contract itself which prevents the Court from granting specific performance.

The Court however will not grant specific performance in a case of this kind unless it is satisfied that there is no sufficient remedy by way of damages. In the present case the plaintiffs have, in my judgment, a substantial interest in having the contract performed, and so long as it remains unperformed, they may find it impossible, or extremely difficult, to deal with their land in any way. Moreover, it is, in my judgment, a case in which they cannot be compensated by damages. The position is that their only prospect of making an advantageous use of the land in question was and is to erect upon it buildings of which they can dispose either by sale or lease at a profit. In fact, they have not attempted to erect any building at all. The fact that they have not done so cannot be put down to the failure by the defendant to make the roads in question, because although those roads are not completely made up, their state is such that the work of constructing and erecting shops or houses on the land could have been carried out. No doubt, it is true that no effective use could be made of the erections when they were constructed unless there were proper means of joining up with the main sewer, but until the houses were erected or in course of erection the necessity for any such connection with the main sewer did not arise, and it appears to me to be quite impossible for this Court to assess with any degree of certainty what, if anything, may be the damage due to the failure by the defendant to carry out the contract. It seems to me that the attempt which has been made to prove the existence of damage is nothing more than a speculation as to what the plaintiff company might have made if they had erected a certain number of houses and shops, if they had been fortunate enough to find tenants for them at the rent which was to be asked, and if those tenants had remained satisfactory from the point of view of paying their rents for a period of time. What might in fact have resulted from the erection of the proposed buildings in the beginning of 1938 is, as I have said, purely a matter of guessing. There is evidence that some houses and shops in this district are unlet and have been unlet for some period. The building of houses and shops such as these is at the best a somewhat speculative way of investing money, and I think it would be quite impossible for any Court to say now what might have resulted from the erection of these buildings at the time when it was proposed to erect them. It may be that the plaintiffs are really better off, as things have turned out, in having saved the money which they would have expended than they would have been had they erected these buildings. It may be, on the other hand, that if they had been very fortunate, they could have found tenants quickly and could have made a profit, but the whole matter is so speculative that I feel it impossible to assess any sum as representing the compensation to which the plaintiffs are entitled for the failure by the defendant to carry out her contract, especially having regard to the fact that it is not possible to say that all the damage, whatever it may be, which they think they may have suffered is wholly due to the defendant's failure to carry out her contract. It is to some extent due to the fact that the plaintiffs themselves have not done what they might have done in erecting the houses and shops.

In all the circumstances, this is a case, in my judgment, in which the only adequate remedy for the plaintiffs is by way of specific performance. I am not oppressed with the difficulty of seeing that an order for specific performance is obeyed, and I feel that if I were not in a position to make such an order, I could not give the plaintiffs any adequate remedy. In fact, it would be a case where the plaintiffs, having a perfectly good covenant which had been broken, and being entitled prima facie to have that covenant performed, would be deprived of a remedy because, if I took the view that I could not grant specific performance, they would get no adequate compensation.

In all these circumstances, I have come to the conclusion that in this case there should be an order for specific performance of the covenant. So far as damages are concerned, I can give the plaintiffs no more than a nominal amount. The

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plaintiffs, accordingly, will have an order for specific performance and for the payment to them of 40*s*. damages. They are entitled to the costs of the action.

Solicitors : *Payne & Co.* ; *Clarke & Co.*

F. H. C.

# WILSON *v.* LONDON MIDLAND AND SCOTTISH RAILWAY.

SIMONDS J.

1939
Dec. 11, 12.

[1939. W. 2288.]

*Railway company—Directors—Powers and rights—Annual general meeting—Issue of stamped proxies to stockholders holding* 2500*l. stock or more—Directors also directors or shareholders of other companies trading with the railway—Companies Clauses (Consolidation) Act,* 1845 (8 *&* 9 *Vict. c.* 16), *ss.* 64, 65, 76, 85, 87.

The directors of a railway company are entitled to send out stamped proxy forms in their names to stockholders holding not less than a minimum amount of stock, such as 2500*l.*, in order to secure a quorum of votes representing not less than 1,000,000*l.* at the annual general meeting, but they are not bound to send out any proxy forms along with the notice of the meeting to any stockholders.

A director of a railway company is not disqualified from holding his office or prevented from acting as director, by reason of the fact that he may also be a director of or a shareholder in another company which has entered into a trading contract with the railway company, but he may not vote on any question relating to such a contract.

*Lapish* v. *Braithwaite* [1926] A. C. 275 applied to the construction of s. 85 of the Companies Clauses (Consolidation) Act, 1845.

WITNESS ACTION.

The plaintiff, by his statement of claim, which was divided into five parts, claimed that the defendant company was using its powers and spending money in issuing proxies with the names of certain directors inserted, and with stamped covers for their return, and without the indication of any policy of action to support or enforce, together with a letter asking for their return, and that in issuing such proxies the smaller shareholders were ignored, and did not participate in the same privilege to record their vote, and that that was in contravention of ss. 69, 75 and 76 of the Companies Clauses (Consolidation) Act, 1845. Further, in part 4 the plaintiff claimed a declaration that directors of the railway company who were also directors

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and trustees of other incorporated joint stock companies trading directly and indirectly with the railway company were contravening ss. 85 and 86 of the railway company's special Act and were outside the classification of s. 87.

The plaintiff made other claims stated in parts 2, 3 and 5 of his statement of claim, the decision on which does not call for any report.

Evidence was given by Mr. G. Royde Smith, assistant secretary of the defendant company, that it was the practice of the company to send out before the annual general meeting to all stockholders holding not less than 2500*l.* nominal amount of stock, stamped proxy forms made out in the directors' names, with stamped and addressed envelopes for their return to the company. The proxy forms being accompanied by a circular letter from the chairman and sent out about a week before the annual report and abridged accounts. The object of this was to secure the quorum of votes representing in nominal value 1,000,000*l.* ordinary stock, which was required by the amalgamation scheme of 1923. The witness said that to send out stamped proxy forms to every shareholder would involve very great expense, and if any considerable proportion of them were returned, a great deal of clerical work would be involved in verifying the returns. When the company are promoting a Bill in Parliament they are required by Standing Orders to send out to all shareholders unstamped blank proxy forms, and in order to save expense these proxy forms, which are for use at what is known as a Wharncliffe Meeting, are sent out with the report and abridged accounts which are submitted to the ordinary meeting.

The plaintiff *J. Wilson* appeared in person and contended that the procedure of the defendant company was unfair to the majority of smaller shareholders. On the second point he argued that any director of the railway company who was also a director of any joint stock company trading with the railway company was disqualified from office by the Companies Clauses (Consolidation) Act, 1845.

*Charles Harman K.C.* and *Andrewes Uthwatt* for the defendant company. The directors are not bound to send out proxy forms to any stockholder, but they are entitled to do so, and they send them out to sufficient of the stockholders to secure the necessary quorum of votes for the meeting: *Peel* v. *L. & N. W. Ry.* (1)

On the second point, no director of the railway is disqualified from acting by being a director of another company trading with the railway unless he is a managing director paid by commission on profits, and there is no evidence of that. The point is covered by *Lapish* v. *Braithwaite.* (2)

SIMONDS J. The plaintiff, Mr. John Wilson, is a stockholder of the defendant company, the London Midland and Scottish Railway Company, and he claims, among other relief: "An "injunction to restrain the company and the directors from "depriving the minority of the special privileges given to "the majority to vote by proxy at the general meeting at "the company's expense, contravening sections 64, 75 and 76 of "the Companies Clauses (Consolidation) Act, 1845."

I have read the relief as claimed by the plaintiff in his writ. What he really attacks is a system by which the directors of the defendant company send to certain but not all the stockholders of the defendant company a proxy form already stamped, and with it a stamped envelope, so that they can return the proxy form duly filled in to the defendant company. He alleges that that is a breach of the statutory provisions of the Companies Clauses (Consolidation) Act as applied to this company.

Sect. 64 of the Companies Clauses (Consolidation) Act, 1845, provides: "The several holders of such stock shall be entitled "to participate in the dividends and profits of the company, "according to the amount of their respective interests in such "stock, and such interests shall, in proportion to the amount "thereof, confer on the holders thereof respectively the same "privileges and advantages, for the purpose of voting at "meetings of the company, qualification for the office of "directors, and for other purposes, as would have been

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(1) [1907] 1 Ch. 5.

(2) [1926] A. C. 275.

"conferred by shares of equal amount in the capital of the "company."

It is necessary to see what were the privileges and advantages for the purpose, to put it shortly, of voting which were conferred on shareholders of the company. Those were conferred by s. 75 of the Companies Clauses (Consolidation) Act, 1845, but it is not necessary to refer to that section, because a variation of rights has been effected by the amalgamation scheme of 1923, by which the London and North Western, the Midland, and certain other railways were amalgamated in one group.

Sect. 13 of that scheme provided: "The holders of stock "(other than debenture stock the holders of which have no "voting rights) in the original capital of the company and "(unless otherwise provided by the terms of creation or issue "thereof) the holders of stock (other than debenture stock) "which may after the date of vesting be created by the "company under the provisions of this scheme shall have such "rights of voting as are conferred upon shareholders by "section 75 of the Companies Clauses (Consolidation) Act, "1845, and for the purposes of that section each sum of 100*l.* "of such stock held by any such stockholder shall be deemed "equivalent to one share." There is a proviso that: "In "case the aggregate amount of all the stock (other than "debenture stock) of the company held by any holder shall "be less than 100*l.* but not less than 50*l.* then such holder "shall have one vote in respect of all his stock."

That means, in effect, that any stockholder who has got less than 50*l.* will not have a vote at all; anybody who has got 50*l.* and upwards to 100*l.* will have one vote; and so on for every 100*l.* of stock. Those, then, and those alone, are the voting rights which are conferred by s. 75 of the Act.

Sect. 76 deals with proxies: "The votes may be given "either personally or by proxies, being shareholders, authorized "by writing according to the form in the Schedule (F.) to this "Act annexed, or in a form to the like effect, under the hand of "the shareholder nominating such proxy."

It is plain that there is no obligation on the company to send out with notices of any meetings or any other document, a proxy form at all. It is for the company to decide whether it will send out a proxy. What it has done in this case is that it has selected stockholders of 2500*l.* and upwards, and to them it has issued a proxy already stamped which is in the common form: " I—one of the proprietors of the London Midland and "Scottish Railway Company—do hereby appoint "—then names of certain directors of the company are inserted—"to be my proxy in my absence, to vote in my name upon "any matter relating to the undertaking, proposed at the "annual general meeting of the proprietors of the said company "to be held " on the date named. Accompanying, and indeed forming part, I think, of, the same document, is a notice in this form: "Dear Sir or Madam, A copy of the report and "abridged statement of the financial accounts and statistical "returns for the past year will be sent you in the course of "a few days. If you desire to be supplied with a complete "copy of the accounts, this will be done upon application "being made to the secretary of the company. In the event "of your not intending to be present at the ensuing annual "general meeting on the 24th instant, may I ask you to be "good enough to sign the annexed proxy, and return it in the "accompanying envelope, so as to reach the secretary not later "than the morning of the 22nd instant."

I should, perhaps, have said that for the purpose of notices of annual general meetings the Act prescribes by s. 71 that: "Fourteen days public notice at least of all meetings, whether "ordinary or extraordinary, shall be given by advertisement, "which shall specify the place, the day, and the hour of "meeting; and every notice of an extraordinary meeting, or "of an ordinary meeting, if any other business than the "business hereby or by the special Act appointed for ordinary "meetings is to be done thereat, shall specify the purpose for "which the meeting is called." The practice of the defendant company was to advertise by notice in the proper papers the date of the meeting, the place of it, and the business to be conducted. As I said, they sent to certain selected shareholders, those holding 2500*l.* of stock or over, this proxy form. Besides this they sent to all the stockholders of the company the report and abridged accounts, and with them another document which they had to send under these circumstances. It happens that in every year the company desires to obtain the passing by Parliament of an Act to meet their coming needs. In order to comply with the provisions of the Standing Orders of the Houses of Parliament it is necessary for the company to hold a general meeting at which the promotion of that Bill may be approved, to send a notice of the meeting to be held, and to send with that notice a proxy form which is to be in a certain form, not indicating any persons who are to be the proxy of the shareholder and not bearing on its face any indication of the way in which it is desired that the shareholder should vote.

That notice of a meeting, which is called familiarly a "Wharncliffe Meeting," with the proper proxy form, is as a matter of convenience sent out with the report and abridged accounts to all the stockholders. But no other proxy form, stamped or unstamped, is sent out to the stockholders other than those who hold 2500*l.* of stock or over. As I have said, what is challenged is this. It is said that it is wrong for the directors to make this selection of stockholders who have 2500*l.* worth of stock and to favour them by sending to them a proxy form which is already stamped, with an envelope which is also stamped for its return.

I cannot find that that is any infringement of any statutory provision. There is neither an obligation to send out proxy forms to all the stockholders, nor is there any prohibition against sending out proxy forms to some stockholders and not to others. Therefore if this is in any way an invalid issue of proxy forms to some stockholders, it must be based on some general principle of law or equity.

I can well see that if it could be proved that the purpose of selecting certain stockholders was to obtain support from stockholders who were considered to be likely to support the policy of the directors and to abstain from sending proxy forms to those who it was anticipated would not support the policy of the directors, it would indeed be open to challenge. But that is not the case which is made here. Indeed, no sinister motive of any kind is or could be attributed to the board of the defendant company. It is challenged on some abstract ground as being improper. That, it seems to me, is more than met by this: it has been proved to my satisfaction that the reason why the board adopts this course of sending out proxy forms only to those stockholders who have a holding of 2500*l.* of stock or over is that it is necessary to ensure that there shall be a quorum of stockholders present. It is necessary under the Act and the scheme that one million pounds' nominal value of stock shall be represented at the meeting. It would be a great misfortune if, owing to the absence of stockholders, it was necessary to hold a further meeting. It is, therefore, an obvious measure to secure that a sufficiency of votes shall be represented by issuing proxies to a reasonable number of stockholders who, or some of whom, may be expected to return them.

Further, it is said, and I think reasonably said, that the board is anxious to obtain, even from stockholders who are not present, some expression of confidence in the policy of the board, and it does not seem to me that there can be anything at all wrong in their issuing to stockholders whose holding is substantial a proxy form to enable them to indicate, if they so wish, that they support the board in its policy.

If it is said: Why, then, are only those selected who have 2500*l.* ?—the answer is that the line must be drawn somewhere, and as a matter of administrative convenience this is a convenient line to draw. It must be drawn somewhere, for the reason that there are no less than 200,000 stockholders of the company, and if a stamped proxy with a stamped envelope is sent to every one of those 200,000 stockholders it means a very substantial expense. I was told that the difference in expense between the course pursued and the course advocated by the plaintiff would be something like the difference between 250*l.* and 4000*l.* in each year.

Nor does the matter by any means end there, because the expense of investigating a large number of proxy returns would, for the reasons which Mr. Royde Smith pointed out, be very onerous, involving reference to something like six hundred volumes of register, and the calculation, in each case where a return was made, of the amount of votes which each stockholder was entitled to use.

In the circumstances, it seems to me that on no principle of law or of equity can the action of the directors in issuing proxies in the way they have done be seriously challenged. It was indeed suggested that, apart from sending stamped proxy forms with stamped envelopes to a selected few, a form of proxy might be issued to all the stockholders in the same envelope which contains also the " Wharncliffe Notice." I think sufficient reason has been adduced why that course should not be followed. It might be said that, if it were followed, the provisions of the standing order with regard to the Wharncliffe Meeting had not been observed ; and in any case, the other objections, I think, still remain, that if anything like 200,000 or 50 per cent. of 200,000 stockholders sent in their returns, it would be a grave and onerous burden for the company to have to deal with all those returns.

For these reasons I must refuse the plaintiff the relief which he seeks under para. 1 of his writ.

The fourth point raised by the plaintiff is this. He claims "A declaration that directors"—that is, directors of the defendant company—"who are directors and trustees of other "incorporated joint stock companies trading directly and "indirectly with the London Midland and Scottish Railway "Company are contravening sections 85 and 86 of their Special "Act and are outside the classification of section 87."

The first answer to that claim is, I think, that it is a point which cannot properly be decided in the absence of the directors whose position as directors is challenged ; for the plaintiff seeks a declaration that certain persons are disqualified from acting as directors without making them defendants and giving them an opportunity of being heard in their own defence. That by itself, I think, is a complete answer to this claim that is made ; but, as it has been raised, perhaps it is desirable even in their absence that I should state my opinion on it.

The position is that under s. 85 of the Companies Clauses (Consolidation) Act, 1845, which applies to this company, it is provided that "no person holding an office or place of "trust or profit under the company, or interested in any contract "with the company, shall be capable of being a director" ; by s. 86 : "If any of the directors at any time subsequently to his "election . . . . be either directly or indirectly concerned in "any contract with the company, or participate in any manner "in the profits of any work to be done for the company . . . . "then . . . . the office of such director shall become vacant, "and thenceforth he shall cease from voting or acting as a "director." To those two sections is a proviso : "Provided "always, that no person being a shareholder or member of "any incorporated joint stock company shall be disqualified "or prevented from acting as a director by reason of any "contract entered into between such joint stock company "and the company incorporated by the special Act ; but no "such director, being a shareholder or member of such joint "stock company, shall vote on any question as to any contract "with such joint stock company."

It is a fact admitted by the defence that many of the directors of the defendant company are also directors of joint stock companies which have entered into contracts with the defendant company ; and it is said, therefore, by the plaintiff that such directors are precluded from acting any longer as directors of the defendant company and their office has become vacant.

If that is so, it is certainly a somewhat formidable matter, for I doubt not that, in the hundred years which have passed since the Companies Clauses (Consolidation) Act, 1845, came into operation, there have at all times been directors of the defendant company and its predecessors who have also been directors of joint stock companies which have entered into contracts with the defendant company and its predecessors, and until this moment the point has never been raised.

I think that the answer to it is that what the Act contemplates is that it is only persons who are concerned in contracts with the defendant company in the sense of having a commercial interest in contracts with the defendant company who are aimed at by this section, and that, if and so far as the commercial interest consists only in a shareholding in a company which enters into a contract with the defendant company, that is safeguarded by the provisions of s. 87, that is to say, a person who is a shareholder in a company which enters into a contract with the defendant company may nevertheless continue to be a director of the defendant company. It is immaterial whether, in addition to being a shareholder, he is also a director of the contracting company. It is his commercial interest which is aimed at; that, if it is a shareholder's interest, is protected, and the fact that he is also a director is immaterial.

That view of the Act is, I think, strongly supported by the decision of the House of Lords on the somewhat similar provisions of the Municipal Corporations Act, 1882, in *Lapish* v. *Braithwaite* (1) in which this was decided—I am reading from the headnote in the law report: "An alderman, who is "also a shareholder and managing director of companies "having current contracts with the borough council, if he is "paid as managing director by salary and not by commission, "is not disqualified for being an alderman under sections 12 "and 14 of the Municipal Corporations Act, 1882, as a person "having a share or interest in any contract with the council." In that case it was held that a person did not within the meaning of those sections have a share or interest in any contract with the council because he was a director of a company which entered into such a contract. As a shareholder in such a company he was protected by sub-s. 2 of s. 12. It was immaterial for the purpose of that Act that he was also a director.

Similarly, here, I think that the true position is that a director of a company entering into a contract with the defendant company has not any additional interest at which the section aims beyond his commercial interest. As a shareholder of the contracting company he is protected. As a director of a contracting company he is not affected. And, therefore, although strictly the point is not one which ought to be decided in the absence of the directors whose office or

(1) [1926] A. C. 275.

continuance in office is challenged, holding the view which I do on the point, I can express my opinion in that way. That point, also, must fail.

Solicitor: *Alexander Eddy.*

H. L. L.

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Nov. 16, 17, 20, 21, 22, 23; Dec. 13.

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[1937. A. 895.]

*Electricity supply—Domestic consumer—Scale of charges—Two-part tariff—Fixed and running charges—Exceptional demand—Validity of tariff—Revision and increase of charge by undertaker—Arbitrary basis of increase—Not explained to consumer—Undue preference—Electric Lighting Act,* 1882 (45 *&* 46 *Vict. c.* 56), *ss.* 19, 20—*Electric Lighting (Clauses) Act,* 1899 (62 *&* 63 *Vict. c.* 19), *Sch., paras.* 31, 33—*Electricity (Supply) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 51), *s.* 42.

In 1933 S., a resident of Wimbledon, who was already taking a supply of electricity for his house from the defendants, the authorized undertakers, applied to them for a contract to take current for lighting and heating the house on their two-part tariff, which was composed of a fixed charge, based, according to the defendants, on the size and type of premises supplied, and a running charge per unit varying with the season of the year. S. was informed that the fixed annual charge on his house would be 16*l.* (afterwards reduced to 15*l.*) and he entered into a contract for a supply on those terms.

In 1936 he discovered that other houses in the same area with the same floor space were subjected to an annual charge of about 7*l.* only, and he applied for a reduction. The defendants replied that, being a large consumer, they could only reduce his fixed charge to 7*l.* on condition that he submitted to a maximum limit of 2½ kilowatts at times of peak load. S. accepted this limit for a time, but made repeated efforts to find out from the defendants, on what basis his original fixed charge of 15*l.* was estimated. The defendants refused to supply him with any information on this matter, and after much correspondence, reimposed the fixed charge of 15*l.*

In an action by the Attorney-General at the relation of S., and by S., claiming that the charges imposed on his house were ultra vires and illegal, and a declaration that he was entitled to be charged the same fixed charges as other houses with the same floor space in the area, and that the charges imposed on him were an undue preference of other consumers against him:—

*Held*, that the defendants' two-part tariff, although not authorized by the Minister of Transport under s. 42 of the Electricity (Supply) Act, 1926, was not invalid, but was justified under para. 33 of the Schedule to the Electric Lighting (Clauses) Act, 1899. The tariff was framed on an arbitrary and capricious basis of the "nature of the electrical demand," and being subject to adjustment by the staff of the defendants, was open to objection, but was not on that account per se ultra vires and illegal.

*Held*, however, that it having been proved that the defendants had not observed their basis of assessment, and had charged other consumers, whose consumption figures showed that they should be specially assessed, no more than the ordinary fixed charge based on floor area, the plaintiff S. had clearly made out his case that the defendants had shown an undue preference against him, and he was therefore entitled to judgment on his claim for an injunction in the terms of s. 19 of the Electric Lighting Act, 1882.

The action, however, by the Attorney-General would be dismissed.

WITNESS ACTION.

The defendants were the undertakers under the provisions of the Electricity Supply Acts, 1882 to 1936, for the area embracing Wimbledon, Merton, the Maldens and Coombe.

The plaintiff, Major Charles Stevens, was the owner and occupier of a house, No. 204 Worple Road, Wimbledon, within the defendants' area of supply. In 1933 the defendants invited the plaintiff Stevens to take electrical energy under their existing two-part tariff for domestic consumers. The two-part tariff consisted of a fixed charge and a unit charge. By the defendants' terms and conditions of 1933 relating to their two-part tariff the fixed charge was expressed to be assessed by the defendants' chief engineer and manager merely in accordance with the size and type of house and his decision as to the fixed charge was to be final and conclusive and the unit charge was to be ½*d.* per unit for all electricity consumed during the two winter quarters and ⅓*d.* per unit for all electricity consumed during the two summer quarters. It was further provided by the defendants' 1933 terms and conditions that any contract thereunder might be terminated by a consumer on giving one month's notice in writing, to expire at the end of any complete period of 12 months, but that the defendants should be at liberty to alter the terms and conditions of supply from time to time on giving not less than one month's notice. The plaintiff Stevens duly accepted the defendants' invitation and was notified that the fixed charge for his house would be 16*l.* In February, 1934, the defendants gave notice that they had altered the terms and conditions relating to their two-part tariff. Such alterations so far as material were as follows: The fixed charge was

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expressed to be assessed by the defendants based on the size and nature of the electrical demand of the house and their decision as to the fixed charge was to be final and conclusive; the amount of the unit charge was not specified; and the defendants were to be at liberty to revise the terms and conditions of supply from time to time on giving notice without any limitation as to the time of such notice. As from July 1, 1934, the defendants reduced the fixed charges on the plaintiff Stevens' house, in common with all other fixed charges under the two-part tariff, to 15*l.* In October, 1936, the plaintiff Stevens discovered that other houses within the defendants' area of supply of the same floor area as his own were only subject to a fixed charge of 7*l.* 0*s.* 6*d.* The plaintiff Stevens thereupon protested against the amount of the fixed charge assessed on his house and demanded that it be reduced to the amount assessed on other houses within the area of supply having the same floor area. The defendants refused so to reduce the fixed charge on the plaintiff Stevens' house save on the condition that he submitted to a limit on his maximum demand of 2½ kilowatts during the hours of 8 A.M. to 9 A.M. and 5 P.M. to 7 P.M. in the months of November and December in each year. No such limit was imposed by the defendants on any other house within the area of supply having a similar floor area. The plaintiff Stevens accepted the condition imposed by the defendants and his fixed charge was thereupon reduced to 7*l.* 0*s.* 6*d.* He continued, however, to demand from the defendants information as to the basis or method on or by which the annual fixed charge on his house was assessed. This information the defendants refused to give, and ultimately in March, 1937, they informed the plaintiff Stevens that from March 31, 1937, he would be charged at the ordinary flat rates.

At the trial it appeared from the evidence given on behalf of the defendants that in assessing the fixed charge on a consumer who desired to take electricity under the defendants' two-part tariff, it was the practice of the defendants to calculate the cost of electricity to the consumer at the flat rate per unit in respect of his previous year's consumption and to calculate also for purposes of comparison the cost of the same consumption under the defendants' two-part tariff with a fixed charge assessed on floor area alone. If on such comparison it appeared that the saving to the consumer under the defendants' two-part tariff with a fixed charge assessed on floor area alone was under 25 per cent., the consumer's fixed charge remained assessed on floor area alone; but if on such comparison it appeared that there was a saving to the consumer of 25 per cent. or over, the case was referred to the defendants' engineer for him to make a special assessment in respect of the fixed charge. It was also established in evidence that in the case of three houses—namely, "Kingfishers," The Drive, Kingston Hill, "The Brake," Almer Road, Wimbledon, and 9 Highbury Road—which were of similar floor area to the plaintiff Stevens' house and which showed a saving of over 25 per cent. under the defendants' present tariff, no special assessment had been made in respect of the fixed charge which had been based on floor area alone.

This action was brought by the Attorney-General at the relation of the plaintiff, Major Stevens, and by Major Stevens as second plaintiff. The plaintiffs jointly claimed a declaration that the defendants' two-part tariff was ultra vires and invalid and an injunction to restrain them from supplying electricity on the terms thereof; and, in the alternative, a declaration that all consumers within the defendants' area of supply were entitled at their option to be supplied under a two-part tariff imposing uniform terms and conditions on each consumer and an injunction to restrain them from supplying electricity otherwise than on such terms. In addition the plaintiff Stevens for himself claimed, upon the footing that it was ultra vires the defendants to supply electricity on the terms of a two-part tariff, a declaration that he was entitled to have his fixed charge assessed in the same sum as that assessed on houses of similar type and size to his without the imposition of the restriction of a limit of maximum demand of 2½ kilowatts; a declaration that he was entitled to be informed by the defendants of the basis and method by which the fixed charge was assessed on his house; an injunction to restrain the

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defendants from imposing any limit of maximum demand on his house other than a limit uniformly imposed on all houses of a type and size similar to his; and ancillary relief.

*Charles Harman K.C.*, *J. Leonard Stone* and *F. Bower Alcock* for the plaintiffs. A two-part tariff is bad unless authorized by the Minister of Transport under s. 42 of the Electricity (Supply) Act, 1926: see Electric Lighting (Clauses) Act, 1899, Schedule, clauses 31 and 33. Clause 33 was never intended to cover a general scheme for all ordinary consumers; it was intended to cover individual agreements in the case of special consumers. In a two-part tariff, such rate is a general offer and a general offer is not authorized by cl. 33.

A two-part tariff in which the fixed charge is based on floor area is invalid because it is bound to produce undue preferences between members of the class who enter into agreements under it and therefore offends against ss. 19 and 20 of the Electric Lighting Act, 1882. (1) Any tariff in which a charge based on floor area is an element must necessarily result in widely differing prices per unit. The defendants have themselves recognized this difficulty and have attempted to assist it by making adjustments in special cases.

But such adjustments are entirely arbitrary. A practice whereby special assessments in respect of the fixed charge are only made where a saving of 25 per cent. or over is shown must lead to undue preferences. A consumer who shows a saving of less than 25 per cent. is assessed on floor area alone in respect of his fixed charge, however abnormal his load may be; a new consumer is also assessed on floor area alone though in his case there are no available pre-existing data. The special assessments are based on no method which skill or experience can discover; the defendants have failed to establish what, if any, factors other than floor area are taken into account in fixing special assessments or how such factors if they are taken into account, are correlated. The adjustments in fact depend on the sole judgment of the defendants' engineer. This is not a system; there are no fixed principles underlying the defendants' practice; it is purely fortuitous.

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(1) The Electric Lighting Act, 1882, provides as follows:—

Sect. 19: "Where a supply of "electricity is provided in any "part of an area for private pur-"poses, then except in so far as "is otherwise provided by the "terms of the licence, order, or "special Act authorising such "supply, every company or person "within that part of the area "shall, on application, be entitled "to a supply on the same terms "on which any other company or "person in such part of the area "is entitled under similar circum-"stances to a corresponding "supply."

Sect. 20: "The undertakers "shall not in making any agree-"ments for a supply of electricity, "show any undue preference to "any local authority, company, "or person, but, save as aforesaid, "they may make such charges for "the supply of electricity, as may "be agreed upon, not exceeding "the limits of price imposed by or "in pursuance of the licence, "order, or special Act authorising "them to supply electricity."

Domestic consumers are part of a class of private consumers. No domestic consumers take a supply under dissimilar circumstances; all take a corresponding supply within the meaning of s. 19 of the Electric Lighting Act, 1882. Any differentiation, based on the fact that one instals radiators, heaters, cookers and other electric appliances while another does not, is an undue preference. There is no agreement, properly so called, under the defendants' revised terms and conditions. No unit price is specified and while a right of variation (on giving notice without reference to time) is reserved in favour of the defendants, no corresponding right is reserved in favour of the consumer. The result is that the consumer may for eleven months be charged a price to which he has never agreed. That may be a "*Diktat*"; it is not an agreement. Further it is a breach of s. 31 of the Electric Lighting (Clauses) Act, 1899, and offends against s. 8 of the defendants' Private Act of 1911.

The 2½ kilowatt restriction imposed on the plaintiff Stevens is indefensible in any case. No such restriction has been imposed on any other consumer and it is in effect a practical refusal to allow the plaintiff Stevens to use electricity for power purposes at hours of peak load.

[They referred to *Metropolitan Electric Supply Co.* v. *Ginder* (1); *Attorney-General for Victoria* v. *Melbourne Corporation* (2);

(1) [1901] 2 Ch. 799.

(2) [1907] A. C. 469.

*Attorney-General* v. *Long Eaton Urban Council* (1); *Attorney-General* v. *Hackney Corporation.* (2)]

*Sir Lynden Macassey K.C.* and *Maurice FitzGerald K.C.* for the defendants. Apart from definite statutory restrictions there is no obligation upon an undertaker for public supply of electric power to adopt equality of treatment for all consumers.

The principle of undue preference was introduced for the first time into law by s. 2 of the Railway and Canal Traffic Act, 1854: see *Hungerford Market Co.* v. *City Steamboat Co., Ld.* (3) In that case the Hungerford Market Co. were authorized by a private Act of 11 Geo. 4 to take tolls for commodities landed at their pier, and they fixed rates of tolls, but made a distinction between different steamboat companies and charged a higher rate of toll to those which charged a higher fare to passengers, and a lower toll to those which carried passengers at cheaper fares, in order to encourage a cheaper rate of conveyance and attract a larger number of passengers. The defendants objected to this as a preference, and the Court held that the plaintiffs were under no obligation to charge an equal rate of toll in respect of all passengers.

Sects. 19 and 20 of the Electric Lighting (Clauses) Act, 1899, are adaptations of the railway legislation. What is "undue "preference" has been explained in some of the earlier railway cases. *Pickering Phipps* v. *L. & N.W. Ry. Co.* (4); *Rickett Smith & Co.* v. *Midland Ry. Co.* (5); *General Electric Co., Ld.* v. *Great Western Ry. Co.* (6) A difference of mileage rates for the same class of traffic was held not to be an undue preference.

What is an undue preference is a question of fact, and the onus of proof lies on those who allege that any preference is an undue preference. Ordinary commercial considerations must be taken into account. The test in such cases is whether an increase of rate is reasonable. It was reasonable to increase the plaintiff Stevens' rate in the present case, because his consumption of current is so great that if he was charged only on the floor space area of his house, the actual cost of his supply would be much more than he was paying.

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(1) [1915] 1 Ch. 124.
(2) [1918] 1 Ch. 372.
(3) (1860) 3 El. & El. 365.
(4) [1892] 2 Q. B. 229.
(5) (1895) 9 Ry. & Can. Tr. Cas. 107.
(6) (1914) 15 Ry. & Can. Tr. Cas. 53.

There are circumstances which differentiate electric supply from any other supply given by a public undertaking, and the principal one is that there is no practicable means of storing electricity, as there is water in a reservoir. The undertaker must be prepared to supply a maximum demand, and the whole cost of the supply depends upon the amount of such maximum demand: see Electricity Supply Act, 1926, s. 11, which prescribes the tariff for electricity supplied in bulk by the Central Electricity Board to authorized undertakers. This is a two-part tariff for it must include—(*a*) a fixed kilowatt charges component and (*b*) a running charges component.

The defendants' flat rate for lighting is exceptionally low —only 3*d*. a unit. The defendants are bound to take some action to meet the exceptional case of a consumer using so much electricity that on the ordinary two-part tariff the cost of the supply is greater than the price charged. The two-part tariff at Wimbledon has been framed on the assumption that the average consumer who adopts it will save anything up to 25 per cent. on the flat rate charges. If any consumer saves more than that then there is a loss to the Corporation. On an examination it was found that less than one per cent. of the consumers who adopted the two-part tariff would save more than 25 per cent. on the flat rate: see Electricity (Supply) Act, 1922, s. 22, sub-s. 1, which repeals sub-s. 2 of s. 31 of the Schedule to the Electric Lighting (Clauses) Act, 1899, and alters the previous law as to the revision of prices. That proviso had to be repealed before a two-part tariff could be authorized; and two-part tariffs were definitely authorized by s. 42 of the Electricity (Supply) Act, 1926. Under s. 33 of the Schedule to the Electric Lighting (Charges) Act, 1899, the corporation can enter into agreements with as many consumers as it pleases. If it enters into a particular kind of agreement with, say fifty or one hundred consumers, that imposes an obligation to enter into similar agreements with all other consumers under similar conditions and circumstances. It has

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been contended for the plaintiff that all domestic consumers, as such, take under similar circumstances. But in fact that is not so, and the undertaker is entitled to take dissimilar circumstances into consideration.

They also referred to the Report of the Electricity Commissioners on Two-Part Tariffs (1930).

*Charles Harman K.C.* replied.

*Cur. adv. vult.*

1939. Dec. 13. SIMONDS J. This is an action by the Attorney-General on the relation of one Charles Henry Stevens, who is the owner and occupier of a private dwelling-house, No. 204, Worple Road, Wimbledon. The defendant corporation are, under the conjoint effect of numerous provisional orders, which were duly confirmed by Acts of Parliament, authorized, subject to these orders and to the provisions of the Electricity (Supply) Acts, 1882 to 1936, to supply electrical energy within an area of supply embracing Wimbledon, Merton and the Maldens and Coombe. The relator's house is in that area, and on his relation the Attorney-General in this action challenges the validity of the charges which the defendants make for the electricity supplied by them under the form of two-part tariff which they have adopted. The relator himself joins as co-plaintiff, claiming in his own right the relief to which I shall later refer.

Nothing here turns on the provisions of the Wimbledon provisional orders. The defendants' powers of charging for a supply of electrical energy are governed by the Electricity (Supply) Acts; in other words, they may charge according to (1.) the actual amount of energy supplied, or (2.) the electrical quantity contained in the supply, or (3.) by such other method as may for the time being be approved by the proper authority, now the Minister of Transport. But in addition to those statutory methods of charge it is open to a local authority as undertaker to avail itself of s. 33 of the Schedule to the Electric Lighting (Clauses) Act, 1899, and since this is the section by virtue of which the defendant corporation have purported to charge the relator, I will set it out.

Sect. 33 of the Schedule to the Electric Lighting (Clauses) Act, 1899, provides: "Subject to the provisions of the special "order and of the principal Act, and to the right of the "consumer to require that he shall be charged according to "some one or other of the methods above mentioned, the "undertakers may make any agreement with a consumer as "to the price to be charged for energy, and the mode in "which those charges are to be ascertained, and may charge "accordingly."

Of this section the defendant corporation took advantage to introduce in the year 1933 a form of two-part tariff which, as it was hoped, would benefit a large number of consumers of electricity within the area of supply, and would result in a greatly increased consumption. They did not, as perhaps they might have done, obtain or try to obtain the authority of the Minister under s. 42 of the Electricity (Supply) Act, 1926, but preferred to introduce it by agreement with each consumer, leaving untouched the right of the consumer to be supplied at such flat rate as the private Acts or orders authorized.

The terms and conditions of the two-part tariff so introduced are conveniently set out in their original and later form in the particulars of defence. In their original form they were described as: "Terms and conditions of the two-part tariff "for the supply of electricity for domestic purposes in a "private dwelling-house, bungalow or flat," and provided that "Consumers of electrical energy in premises occupied solely "as private residences may at their option and as an alternative "to the existing rates, be charged for the supply for all purposes "under a two-part tariff," which comprised: "(A) An annual "fixed charge based on the size and type of premises occupied "with the addition of: (B) A charge of ½*d.* per unit for all "electricity consumed during the two winter quarters and "⅓*d.* per unit for all electricity consumed during the two "summer quarters." There was the further term that the fixed charge should be payable by equal quarterly instalments and should be assessed by the chief engineer and manager of the defendant corporation's electricity undertaking [hereinafter referred to as the electrical engineer] mainly in accordance with the size and type of house, and his decision as to the fixed charge should be final and conclusive. Further terms were that the supply should be given on the basis of an annual contract and that the corporation reserved the right to revise and alter the terms and conditions of supply from time to time if found necessary on giving not less than one month's notice by advertisement or otherwise.

In April, 1934, these terms and conditions were materially changed. I need only notice that the fixed charge was to be "assessed and notified by the corporation based on the size "and nature of electrical demand of house and their decision "as to the fixed charge is final and conclusive." The price per unit is not stated and a month's notice was no longer required for the exercise of the reserved right of revision and alteration.

These were the terms on which the relator and many other consumers agreed to take a supply of electricity from the defendant corporation. The relator, who had for many years been a consumer both for lighting and power purposes, and had paid for the units consumed by him at the appropriate rates, was attracted by the possibility of saving on the two-part tariff, and made inquiries of the corporation what would be the fixed charge for his premises, No. 204, Worple Road, and was on November 22, 1933, informed that the annual fixed charge would be 16*l.*, and that the additional charge would be only ½*d.* per unit during the two winter quarters and ⅓*d.* per unit during the two summer quarters, whether for lighting or power purposes. He was further told that, on the basis of his consumption during the four quarters ending September, 1933, he would, by coming on the new tariff, save 22*l.* 8*s.* 4*d.* Accordingly, on November 24, he made formal application to the defendant corporation to be charged for the supply of electrical energy in accordance with the terms and conditions of the two-part tariff, and agreed to pay as the annual fixed charge a sum of 16*l.* in four quarterly instalments as required. His application was accepted, and he was thereafter charged on the new basis. It is irrelevant to this part of the case that in 1934 the defendant corporation, in exercise of the right which

I have mentioned, purported to alter in certain respects the terms of supply.

On these bare facts the first question arises. It is claimed that the defendants' two-part tariff is ultra vires and the claim is supported by a number of contentions with which I must shortly deal. First it is said that the defendants are making a misuse of section 33 of the Schedule to the Act of 1899. That section, it is said, being intended to meet only the exceptional case where a special agreement is made necessary by special circumstances, the defendants are using it to offer a tariff to all and sundry who care to take it. I see no force in this contention. If an undertaker can make an agreement with one consumer he may make it with ten, a hundred, or a thousand consumers. He may be laying up for himself a store of difficulties, but that does not at this stage arise.

Secondly, it is said that it is not permissible to make an agreement under section 33 which takes the form of a two-part tariff. That, it is said, is a special form of charge for which provision is made by section 42 of the Electric Lighting Act, 1926, and it is not to be supposed that the Legislature intended on the one hand to authorize, subject to special safeguards, that particular method of charge, and on the other hand to permit it as an agreed method of charge under section 33 of the earlier Act. This is, I think, a mistaken contention. It is one thing to allow undertaker and consumer to come to an agreement, and another and very different thing to permit the undertaker to impose on the consumer a particular form of charge. It is with the latter only that the Act of 1926 was concerned. The defendant corporation were, in my judgment, entitled to enter into an agreement for a two-part tariff with the relator and other consumers.

Next, a contention is raised which makes it necessary to refer to other provisions of the Electricity Acts, though they are more directly relevant to other questions raised in the action. By section 19 of the Electric Lighting Act, 1882: "Where a supply of electricity is provided in any part of an "area for private purposes, then except in so far as is otherwise "provided by the terms of the licence, order, or special Act "authorising such supply, every company or person within "that part of the area shall, on application, be entitled to a "supply on the same terms on which any other company or "person in such part of the area is entitled under similar "circumstances to a corresponding supply." Section 20 of the same Act provides: "The undertakers shall not, in making "any agreements for a supply of electricity, show any undue "preference to any local authority, company, or person, but, "save as aforesaid, they may make such charges for the supply "of electricity, as may be agreed upon, not exceeding the "limits of price imposed by or in pursuance of the licence, "order, or special Act authorising them to supply electricity."

I will later consider those sections in relation to the particular facts of this case on which the relator relies for his claim that their provisions have in fact been infringed. At this stage their relevance, as I understand it, is that the relator says that, given such terms and conditions as constitute the agreement here under consideration, it follows that there must be a breach of the statutory provisions. A system, it is said is inherently vicious by which a fixed charge is based on "the "size and type" of premises, or "the size and nature of electrical "demand," with a proviso that the decision of the electrical engineer or of the corporation is to be final and conclusive and the reservation of a right to the corporation to revise and alter at will the terms and conditions of supply. I so far concur in this contention as to agree that such a system is a thoroughly bad one. A method of charging which is not based on any precise and ascertainable formula, but proceeds from the vagueness of "type" and "nature of electrical "demand" to the final and unchallengeable decision of an official of the local authority is open to grave abuse. The committee appointed by the Electricity Commissioners to report on the uniformity of electricity charges and tariffs were unanimous in their 1930 report in expressing their strong disapproval of any basis of charge which requires adjustments by members of the staff of the undertaking, which are not made public.

The method adopted by the defendant corporation is peculiarly open to this criticism. It will appear when I come to examine the evidence that in practice the method became what in theory it might be expected to be, arbitrary and capricious in its incidence and, if capable of explanation, at any rate unexplained by the defendants' officers.

But, however strongly such a method may be condemned, it does not follow that it is ultra vires, and I am unable to conclude that such a method, irrespective of its consequences, is per se illegal and invalid. I cannot, therefore, make a declaration on the broad lines claimed by the plaintiff, but must turn to the other part of the case, which raises the question whether, assuming that the system is not per se an illegal one, it has not been operated as between the relator and other consumers in such a way as to infringe ss. 19 and 20 of the Act of 1882.

In considering this question I must bear in mind the principles laid down by Sargant J. and the Court of Appeal in *Attorney-General* v. *Long Eaton Urban District Council* (1) and by the Court of Appeal in the *Attorney-General* v. *Hackney Corporation* (2) and, further, the particular conditions under which the defendants purchase their supply from the Joint Electricity Authority and sell it to their own consumers. Circumstances which render it less costly or otherwise more profitable to supply other customers than the relator constitute a legitimate reason for giving better terms to them than to him, and the Court will not attempt to measure what is probably incapable of measurement, namely, the degree in which, as between one consumer and another, the supply is costly or profitable to the undertaker. Nor is it to be doubted that the undertaker may charge a consumer less in order to induce him to take another supply where taking that other supply will lower the cost to the undertaking of the existing supply: see per Scrutton L.J. in *Attorney-General* v. *Hackney Corporation.* (2)

Again, it must be borne in mind that the supply of electricity is attended by peculiar difficulties. The obligation to meet a maximum demand which only occurs for a short time in the year involves the undertaker in an expenditure on plant and equipment which the output for the rest of the year does not justify. Any consumer who increases the total maximum demand on the undertaker is thus unprofitable as compared with a consumer whose demand does not add to the burden. It is beyond the wit of man to devise a system of charge under which each consumer is charged in exact proportion to the cost of supplying him, and it is questionable whether, if it could be devised, it would be in all respects satisfactory. It remains, however, a fact distinguishing the supply of electricity from that of water or gas that it cannot be provided from a reservoir, so that the cost of supply to different consumers may vary not merely by reason of different circumstances of distribution, but also by reason of the month or week or hour of the day in which their demands have to be fulfilled. In the present case the undertakers do not generate their own electricity, but they are faced in effect with the same problem, as they in turn have to meet charges from their suppliers into which the element of maximum demand largely enters.

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(1) [1914] 2 Ch. 251; [1915] 1 Ch. 124.

(2) [1918] 1 Ch. 372, 396.

I therefore approach the questions which are raised by ss. 19 and 20 of the Act of 1882 with the full consciousness that inequalities are inevitable and that such words as "same "terms," "similar circumstances," "corresponding supply," and "undue preference," must be construed and given effect to with the latitude which the subject-matter demands.

I have already stated the terms on which the relator became a consumer on the two-part tariff at a fixed charge of 16*l.* per annum. On August 16, 1934, he was notified that as from July 1, 1934, his annual fixed charge would be reduced to 15*l.*, the charges per unit for electricity consumed remaining unaltered. On September 13, 1934, he repeated a question which had been asked before and gone unanswered—how the fixed charge was arrived at, alleging that others in higher rented houses were being charged considerably less. From that time until the hearing of this action he tried and tried again to get a clear answer, and did not get one. It was not, indeed, until Mr. A. E. McKenzie, the chief electrical engineer and manager of the defendant corporation's electricity undertaking, went into the witness-box in the course of this action that one at least of the most material factors in determining the fixed charge was divulged. I do not propose to go through all the wearisome correspondence between the relator and the electrical engineer, and later the relator's solicitors and the Town Clerk. The impression left on my mind on a re-reading of it is that a little more candour in its initial stages on the part of the electrical engineer might well have averted these proceedings.

In his reply to the letter of September 13 he declines to give any further information than that contained in the pamphlet issued to all consumers, which amounted only to the statement that the fixed charge was based not only on the size of the premises, but also on the nature of the electrical demand at such premises, and further committed himself to the statement that in none of the premises which the relator was comparing with his own was the demand in any way similar. This was the tone adopted throughout. Further information and explanation were from time to time extracted by the pertinacity of the relator, but, if he regarded the further information as inconsistent with itself and the explanation as obscure, he is not in my judgment to be blamed for that. For, in fact, all the time the electrical engineer was concealing from him the arbitrary adjustments which he thought it desirable to make. It is in truth a difficult task at the same time to give a satisfactory explanation and to conceal the fact which alone explains what is done.

Eventually the relator, who knew well that a much lower fixed charge was assessed on houses which appeared to be in all respects comparable with his, asked and obtained an answer to the question: "Will you tell me the maximum demand that "I can make upon your supply so that the standing charge "on this house may be reduced to that of other houses of "similar size?" The answer given on November 26, 1936, was: "2½ kilowatts at times of our peak load." On this he naturally asked on December 1 what were the times of the peak load, adding that, when he knew, he would see that that restriction was observed. To this, on December 3, 1936, the electrical engineer replied that the relator would realize that through inadvertence it was possible his demand might not be so restricted, and that the corporation in consequence might lose heavily on his supply: it would, therefore, be necessary to instal a time switch and circuit breaker automatically to ensure that during the months of November and December the demand at the relator's premises should be restricted to 2½ kilowatts between the hours of 8 A.M. and 9 A.M. and the hours of 5 P.M. and 7 P.M. daily. He pointed out the inconvenience of such a restriction and added that if the relator wished to proceed further in the matter he would ascertain what the necessary apparatus would cost and inform him what the rental for it would be.

I pause to point out that 2½ kilowatts is a very small amount and that the restriction would not, for instance, permit simultaneous consumption by two ordinary electric fires. Not unnaturally the relator replied that he was willing to instal any gadgets and fit any check on supply in the same way as the supply of anyone else was checked and to pay the cost which it was usual to charge the residents in a house of similar size in similar circumstances. On December 8 the electrical engineer replied: "By your letter of the 1st instant you "agreed to restrict the demand at your premises to 2½ kilowatts "between the hours of 8 A.M. to 9 A.M. and 5 P.M. to 7 P.M. "throughout the months of November and December in each "year, and therefore on that condition and as from the date "of the above letter the fixed charge on your premises has "been reduced to *7l.* 0s. *6d.* per annum, which is the fixed "charge applicable to any other house in the borough of "similar size to your own with a normal demand. In the "first part of your letter under acknowledgment you give me "permission to instal any gadgets that I may wish to check "your supply. I accept this offer with thanks and propose "to do this and will give you 48 hours' notice." This letter at least discloses that *7l.* 0s. *6d.* would be the fixed charge for the relator's house if his demand were "normal," though that term is still undefined.

On December 11 the relator replied that he took it that the electrical engineer's letter meant that all houses of that size were likewise restricted during the same hours of the same months, as that was the only condition he was put on the same footing as to fixed charge. To this, on December 12, the electrical engineer replied, saying: "There is no other house "in our area of supply of similar size to your own where the "same maximum demand may arise as at your premises, but "I can assure you that if a similar case does arise the same "limitation will be imposed unless the consumer is willing to "pay the increased fixed charge that we have asked from you "and which you have refused." If this letter is intended to mean that no house of similar size had an exactly same maximum demand it may be correct. But it appears to me to be a letter which is difficult to justify. For it is obvious that such a restriction, if imposed at all, ought to be imposed not only where the maximum demand was the same as the relator, but wherever it was such that there was a reasonable possibility of a load of 2½ kilowatts being exceeded during the peak hours. At any rate, it was not satisfactory to the relator, and after further interminable correspondence, in the course of which on February 23, 1937, the electrical engineer once again refused to explain in detail how he arrived at the fixed charge, this action was brought.

In the course of the action discovery was had and certain interrogatories delivered. But even so the relator must have come into Court without knowing, or his advisers knowing, why his fixed charge should be 15*l.* if a house of the same size with a so-called normal demand was charged 7*l.* 0*s.* 6*d.* He knew that the fixed charge was determined by the size and the nature of the electrical demand. He knew, or could assume, that the size of the house was a factor capable of certain assessment. On the other factor, the nature of his electrical demand, he could obtain no satisfactory information. It is indeed a striking fact that he was not told that the essential feature of the fixed charge system was that the assessment was based on floor space, that is to say, size only, unless it appeared that the consumer, on a basis of past consumption, would save more than 25 per cent. of his electricity cost by going on the two-part tariff. It was only when the electrical engineer was in the witness-box that this fact came out. It did not matter whether the consumer's load factor (1) was good or bad from the point of view of the undertaker. If he saved less than 25 per cent. his case was not brought before the chief engineer for special assessment. If he saved more than 25 per cent., then he was specially assessed in a sum which might be twice or thrice the fixed charge based on floor area, or any other sum which the electrical engineer thought fit to select. This, at least, was the system, and it is to be observed that the very factor which over and over again the electrical engineer had told the relator was wholly irrelevant, namely, the number of units consumed, was in fact the first vital element; for the question of special assessment never arose unless so many units were consumed that a certain saving was effected by the two-part tariff.

Having at length ascertained the first step in the system of special assessment, one may pause to examine its bearing on the present case. Let me assume the validity of such an arbitrary decision between consumers who do and do not on the basis of past consumption, save 25 per cent. of their cost, irrespective of what their load factor may be. How is this system worked in practice? It is not suprising to find that its operation is haphazard and capricious. If, for reasons which appear to the defendant corporation as adequate, a saving of 25 per cent. is made a ground for distinction between one consumer and another, it is surely not too much to expect that such a distinction should be observed with reasonable care. I do not lay stress on the fact that the electrical engineer, when challenged with cases where no special assessment was made though the saving was slightly in excess of 25 per cent., justified his action or inaction by saying that he did not work

(1) "Load factor" is defined in Wills' Electricity Supply, 6th ed., p. 96, as the proportion of the number of B.T. Units actually supplied during a period to the product of the KW. of maximum demand during the period and the number of hours during the period, i.e., to the number of units which would have been supplied had the maximum demand been maintained throughout the whole period, and it is expressed as a percentage.

meticulously to that percentage, though that reservation is from an administrative point of view dangerous and undesirable. I do, however, emphasize this fact, which goes in my judgment to the root of the matter. If the defendants, while professing to make it a part of their method of charge that a consumer who saves 25 per cent. by going on the two-part tariff is to be specially assessed, yet in practice in numerous cases do not specially assess consumers who make that saving, they must justify what appears to be a clear infringement of ss. 19 and 20.

I have at some length shown how, at the date of the writ in this action, the defendants were insisting on the necessity of imposing on the plaintiff a fixed charge of 15*l.*, though, if based on floor area only, it would be 7*l.* 0*s.* 6*d.* It was, therefore, instructive to find out whether at the same date other houses, whose normal assessment would be 7*l.* 0*s.* 6*d.*, remained at that figure notwithstanding a 25 per cent. saving. It appeared that, after the writ had been issued and in consequence of it, a scrutiny was undertaken to see whether special assessments had in fact been made in all the cases in which in theory they should have been. And forthwith it was discovered that, in three out of 15 houses of the 7*l.* 0*s.* 6*d.* class, the special assessment which ought to have been made had not been made. These were "Kingfishers," The Drive, Kingston Hill, the fixed charge on which was put up from 7*l.* 0*s.* 6*d.* to 26*l.*; "The Brake," Almer Road, Wimbledon, the fixed charge on which was similarly put up; and 9, Highbury Road, Wimbledon, the fixed charge on which was advanced to 17*l.* 10*s.* 0*d.* In other cases, also, it was ascertained that there had been a failure to act up to the principle which is alleged to have guided the electrical engineer. I am far from satisfied that all or even the greater part of such cases were discovered.

No one, I think, could have examined the numerous files brought before the Court and listened to the explanations of the electrical engineer without coming to the conclusion that but for the plaintiff's action the anomalies of which he complains would have continued. At the date of the writ there were many cases—I need take no more than the three glaring instances which I have mentioned—which make it impossible to say of the relator that he was getting a supply on the same terms as other consumers in similar circumstances were getting a corresponding supply. It appears to me to be irrelevant that the undertakers on the discovery of such cases have chosen to put up their fixed charge above that of the relator, not to bring down his to theirs. The fact was that for a period before the date of the writ other consumers were getting a supply on terms which, in relation to him, were a clear infraction of both s. 19 and s. 20. The defendants cannot, in my judgment, justify it by saying that it was the other consumers who were assessed too low, not he who was assessed too high.

If the facts had been otherwise, if the method of assessment had been plain for all the world to see, and a mistake had been made which on discovery was immediately redressed, it might have been unnecessary for the Court to intervene. But here, from first to last, the defendants have been sedulously evasive, and it was only under the stress of these proceedings that it was revealed that the electrical engineer acted or purported to act on some basic principle in making special assessments, and that in several conspicuous cases this principle had not been observed.

The plaintiff had, in my judgment, no other course open to him than to bring his action, and he is entitled to relief. I have already indicated that I am not disposed to grant an injunction which would debar the defendants from operating by agreement this or any other kind of two-part tariff. It will, I think, meet the case if I grant an injunction following the language of ss. 19 and 20 of the Act. It will be sufficiently clear from what I have already said that the attempts to impose upon the relator alone among consumers a limit of maximum demand cannot be justified.

I must add a word on a further claim raised by the plaintiff. He claims a declaration that he is entitled to be informed of the basis and method by which the annual fixed charge on his house was assessed. I do not think that there is any foundation in law for this claim. The plaintiff need not enter into an agreement with the defendants unless he likes, and they if they like, may make it a term of the agreement that he shall not know the basis and method of charge. That they may run grave risks by taking such a course is shown by this case. And it is in fact much to be deprecated that any local authority undertaker should endeavour, as the defendants have done, to conceal the basis and method of charge. Adjustments of an arbitrary nature are in any case to be avoided. When the further claim is made to make such adjustments behind a screen, and information properly sought is denied, the way is paved to suspicion and discontent. Nor are they without justification. I am content to assume that the existing and gross anomalies, which, as the result of this action being brought, were brought to light and put an end to, were due to carelessness in administration. But it wants little knowledge of public or local administration to appreciate that the exercise of such a power in secret might lead to grave abuse. If the result of the plaintiff's action is to end a system in Wimbledon which has, as I understand, been adopted by no other electricity undertakings, he will have done good service to the community.

But an injunction will not be necessary. The Court, of course, will accept an undertaking which will be in the language of s. 19, that the defendants will supply to the relator-plaintiff electricity on the same terms as any other person in the area is entitled in similar circumstances to a corresponding supply, and that undue preference will not be shown to any other person over the plaintiff. The defendants must pay the plaintiffs seven-eighths of the costs.

Solicitors: *Baileys; Herbert Emerson Smith, Town Clerk, Wimbledon.*

H. L. L.

C. A.

1939

Dec. 8, 11, 12, 13, 14, 15, 18, 19;

1940

Jan. 29.

# BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS.

[1937. B. 2496.]

*Building society—Mortgage—Advance by society on security of house coupled with collateral security given by builder—Whether advance ultra vires the powers of the society—Building Societies Act,* 1874 (37 *&* 38 *Vict. c.* 42), *s.* 13.

A building society advanced a sum of money to the purchaser of a house on the security of the house, coupled with a collateral security from the builders out of a fund provided by them to secure loans by the society to the purchaser and other persons who bought houses from the builders. The amount so advanced was in excess of the normal amount which the society would have advanced on the security of the house alone:—

*Held,* following *Halifax Building Society* v. *Salisbury* (56 Times L. R. 211), that Bennett J. had rightly decided that in making the advance the Society was not acting ultra vires: and *held,* further, that a failure of the directors of the Society to observe mere directory regulations as to procedure contained in the Society's rules would not affect the validity of the advance.

Decision of Bennett J. [1939] Ch. 520, in so far as he dismissed the counterclaim, reversed on other grounds.

APPEAL from Bennett J. (1)

The Bradford Third Equitable Building Society, which was incorporated in 1875 under the Building Societies Act, 1874, sued Mrs. Borders, the owner of a house at Kingsway, West Wickham, Kent, for recovery of possession of the house under an attornment clause contained in a mortgage dated October 10, 1934, whereby the plaintiffs were at liberty at any time after the power of sale had arisen to enter without previous notice.

The plaintiffs lent the defendant 693*l.*, taking from her a mortgage of the house. The normal amount which they would have advanced on the security of her house, which, with the garage, had been valued at 730*l.*, was 545*l.* They advanced 693*l.* because, in addition to the security of her house, they had a collateral security from the builders on a fund provided by the builders to secure loans by the plaintiffs

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(1) [1939] Ch. 520.

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to the defendant and other persons who bought houses from the builders. This agreement was made on March 3, 1934.

On October 17, 1934, a pooling agreement was made between the builders and plaintiffs, under which the sum of 37*l.* (which related to the sum advanced to the defendant) was, with forty-nine other sums deducted from the sums supposed to have been advanced by the plaintiffs to forty-nine other borrowers, made a collateral security provided by the builders for money advanced by the plaintiffs to the defendant and forty-nine other borrowers. By her defence and counterclaim the defendant alleged that in entering into this transaction the plaintiffs were acting ultra vires, it not being within their powers to lend money on any security other than the house.

Bennett J., having held that the plaintiffs had failed to prove that the mortgage deed put forward by them was executed by the defendant, dismissed the action.

The defendant by her counterclaim, claimed (inter alia) damages on the ground that she had been induced by fraudulent misrepresentations made to her by the builders, with the knowledge of the plaintiffs, to enter into the contract.

Bennett J. dismissed the counterclaim, and against that decision the defendant appealed. The appeal was heard on December 8, 11, 12, 13, 14, 15, 18, 19, 1939.

*Comyns Carr K.C.* and *C. H. A. Lewes* for the appellant.

*R. F. Roxburgh K.C.* and *M. G. Hewins* for the respondents.

1940. Jan. 29. SCOTT L.J. In the unavoidable absence of the Master of the Rolls on public business, I may say that the judgment which Clauson L.J. is about to deliver is the judgment of the Court.

CLAUSON L.J. [His Lordship stated the facts and dealt with several points that it is unnecessary to report, and continued :] Before considering the counterclaim, it is necessary (although there is no appeal against the order of the learned judge dismissing the action) to make special mention of one ground of defence set up by the defendant in answer to the claim for possession, since the same point was in this Court relied upon by the defendant as a weapon of offence on the counterclaim. The defendant set up the case that, assuming the mortgage to be duly executed and otherwise an effective document, the transaction between her and the plaintiffs was invalid by reason of the fact that, according to the constitution of the plaintiffs, it was ultra vires for them to advance money otherwise than on the security of a mortgage of real property. It appeared that the advance was not made on the mere security of real property, but was made on a composite security consisting of a mortgage of the house, supported by way of collateral security by a charge given by Morrells (the builders) upon a personalty fund provided with a view to securing the plaintiffs against losses upon advances made to purchasers from Morrells. This matter was elaborately argued before Bennett J., and he held, after an exhaustive consideration of the Building Societies Acts, and of various authorities, that the mortgage, had it been established by the plaintiffs, could not have been treated as invalid on the ground of its being ultra vires. We do not propose to pursue this topic, for the decision of the learned judge on this point was fully considered by this Court in the case of *Halifax Building Society* v. *Salisbury* (1), and held to be correct. It was sought in the present case to set up the point that on the true construction of the rules of the plaintiffs relating to the procedure in regard to advances, it was a condition precedent to any advance being made by the society that the directors should form a bona fide opinion that the real property mortgaged to secure the advances was, apart altogether from any collateral security, a sufficient security for the advance, but as the rules of the Halifax Building Society were in all material respects the same as the plaintiffs' rules in this regard, and this Court decided that the advance in that case was not ultra vires, we should feel great difficulty in giving effect to that argument in the present case, even if we agreed with it. The contention is, however, in our

(1) (1939) 56 Times L. R. 211.

judgment, unfounded. The rules in question are mere internal regulations, enforceable possibly by the society against the directors, but not having the effect of making a transaction which does not comply with them invalid as between the society and those dealing with it, as being outside the scope or the objects of the society. It is unnecessary to do more than refer to the well known cases of *Royal British Bank* v. *Turquand* (1); *Fountaine* v. *Carmarthen Ry.* (2); and, in more recent days, *In re Hampshire Land Co.* (3), as illustrating the distinction between constitutional provisions which limit the scope or objects of the society, and mere directory regulations as to internal management or procedure. It was no doubt owing to a correct appreciation of that distinction by counsel in the case of *Halifax Building Society* v. *Salisbury* (4) that the argument placed before us in the present case was not raised in that case. The new point thus raised cannot in our judgment be supported.

The learned judge then dealt with the counterclaim, and the Court held, reversing Bennett J., that Mrs. Borders was induced by fraudulent misrepresentations, of which the plaintiffs had knowledge, to enter into the contract, and that she was entitled to certain damages.

*Appeal allowed.*

Solicitor for appellant: *W. H. Thompson.*

Solicitors for respondents: *Henry Boustred & Sons, for J. Eaton & Co., Bradford.*

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(1) (1855) 5 El. & Bl. 248; (1856) 6 El. & Bl. 327.

(2) (1868) L. R. 5 Eq. 316.

(3) [1896] 2 Ch. 743.

(4) 56 Times L. R. 211.

P. J. B.

FARWELL J.

1939

Dec. 15.

## MOORGATE ESTATES, LIMITED *v.* TROWER.

[1939. M. 378].

*Mortgage—Covenant by mortgagors to insure mortgaged property against war risks—Impossibility of effecting insurance—Effect—Claim for foreclosure—Action set down for hearing before outbreak of war—No application by summons for leave to proceed—Whether action can be heard—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*b*). (1)

In March, 1936, a building in the City of London was mortgaged to secure a sum of 155,000*l.*, the mortgagors covenanting to keep the premises insured (inter alia) against loss or damage by missiles or projectiles from or fired at aircraft, and it was provided that, should they fail to do so, the mortgagees might insure the premises at the expense of the mortgagors. It was further provided that the power of sale of the mortgagees should immediately become exercisable if the mortgagors should break any of the covenants. Both sides were unaware that the policy of insurance obtained in respect of the premises and sent to the mortgagees' solicitors did not comply with the covenant, though it would then have been possible to obtain a policy in accordance with it, but from October, 1936, such a policy was unobtainable. In January, 1939, the mortgagees having become aware of the defect in the insurance, claimed that their power of sale had become exercisable and served on the mortgagors a notice to pay off the mortgage. The mortgagors having brought an action for a declaration that they were not obliged to comply with the notice, the mortgagees counterclaimed for an account, for payment of the mortgage debt, for foreclosure or sale, for a receiver and for possession of the mortgaged premises. The action was set down and ready for hearing before the outbreak of war in September, 1939.

*Held*, (1.) that there had been a breach of the covenant, since there was no implied term in the contract that if it became impossible to obtain a policy of insurance in accordance with it neither party should be entitled to rely on failure to comply with it;

(2.) that, as the mortgagees were not estopped from setting up their claim and had not waived the performance of the covenant, the mortgagors were not entitled to the declaration they sought;

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(1) By the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: "Subject to the provisions of this "section, a person shall not be "entitled, except with the leave "of the appropriate court .... (*b*) "to institute any proceedings for "foreclosure or for sale in lieu of "foreclosure, or take any step "in any such proceedings instituted before the commencement "of this Act."

By the Courts (Emergency Powers) Rules, 1939, r. 14, sub-r. 1: "An application under sub-s. 2 "for leave to take a step in proceedings for foreclosure or sale in "lieu of foreclosure instituted "before the commencement of the "Act shall be by summons in the "proceedings."

(3.) that, though the mortgagees had not applied by summons under r. 14 of the Courts (Emergency Powers) Rules, 1939, for leave under s. 1, sub-s. 2 (*b*), of the Courts (Emergency Powers) Act, 1939, to institute proceedings for foreclosure or "to take any "step in any such proceedings instituted before the commencement "of this Act," nothing in the Act prevented the case from coming on for trial, since the words "to take any step" did not refer to the hearing of an action set down for trial before the Act came into force.

WITNESS ACTION.

By a mortgage and registered charge dated March 25, 1936, Moorgate Estates, Ld. (hereinafter called "the mortgagors"), mortgaged to William Gosselin Trower and John Anthony Tristram Barstow (hereinafter called "the mortgagees"), a block of offices in the City of London known as Lloyds Bank Buildings (hereinafter called "the mortgaged premises"), the value of which was about 259,000*l.* By clause 1 the mortgagors covenanted to pay the mortgagees on September 25, 1936, the sum of 155,000*l.*, with interest at the rate of 4 per cent. per annum, and if that sum should not be so paid to pay them interest at that rate by equal quarterly payments in each year on the principal moneys for the time being remaining due. By clause 3 the mortgagors charged the mortgaged premises with the payment to the mortgagees of the principal sum and interest covenanted to be paid. By clause 5 the mortgagors covenanted during the continuance of the security to keep the mortgaged premises insured (inter alia) against loss or damage by missiles or projectiles from or fired at aircraft to the full value thereof with the Atlas Assurance Co., Ld., or in some other insurance office or with underwriters of repute to be approved by the mortgagees, provided that on default by the mortgagors to keep the mortgaged premises so insured the mortgagees might insure and keep them insured at the mortgagors' expense. By clause 8 it was provided that if their power of sale should not have become exercisable, the mortgagees would not, before March 25, 1946, call in the principal sum or any part thereof. By clause 9 it was provided that the mortgagors should not be entitled to pay off the principal sum or any part thereof, save by the instalments therein mentioned, before March 25, 1941, unless the mortgagees should take any step to enforce their security, but that the mortgagors might after that date, upon giving three months' notice, pay off all or any part of the principal moneys for the time being owing on their security by instalments of not less than 1000*l.* By clause 10 it was provided that the power of sale should become immediately exercisable by the mortgagees if (inter alia) the mortgagors should break or fail to observe or perform any of their covenants.

On May 18, 1936, the mortgagees' solicitors, having received the policy of insurance effected with the Atlas Assurance Co., Ld., wrote to the mortgagors' solicitors requiring it to be increased to the full value of the mortgaged premises, and also requesting that they should be insured against loss or damage by missiles or projectiles from or fired at aircraft in accordance with the covenant in the mortgage deed. Additional cover was accordingly obtained, and there was sent to the mortgagees' solicitors an endorsement slip for attachment of the policy, which they retained. Neither then nor when the policy was subsequently renewed did the mortgagors' solicitors or the mortgagees' solicitors notice that the additional insurance was not sufficient to comply with the covenant. On January 26, 1939, the mortgagees' solicitors, having become aware of the defect in the insurance, wrote to the mortgagors' solicitors pointing out that the covenant obviously included war risks, against which the mortgagees had failed to insure, and stating that, as in the circumstances the principal moneys became immediately repayable, they thereby gave notice requiring the mortgage to be paid off. On January 27, 1939, the mortgagors' solicitors replied by letter that they had obtained the full cover which insurance companies would give in respect of the risk, and that the mortgagees had throughout accepted the policy as being in compliance with the covenant. It appeared that from October, 1936, it would have been impossible to obtain a policy of insurance in full compliance with the terms of the covenant.

On February 2, 1939, the mortgagors commenced an action against the mortgagees claiming a declaration that they were not bound to comply with the notice to pay off the mortgage. The statement of claim was delivered on April 12, 1939. On April 25, 1939, the mortgagees delivered a defence and counterclaim. Their counterclaim was for an account of what was due to them under the mortgage, for payment to them by the mortgagors of the principal sum of 155,000*l.*, with interest, that the mortgage and registered charge might be enforced by foreclosure or sale, for a receiver and for delivery of possession of the mortgaged premises. The reply of the mortgagors was delivered on May 9, 1939, and the action was set down for hearing before the outbreak of war in September, 1939.

*Sir William Jowitt K.C.* and *Gerald Gardiner* for the plaintiffs. It is difficult to derive help from the authorities dealing with frustration of contracts. This is not one of those cases. One term only of the contract has ceased to be enforceable, that relating to insurance against war risks. It is always a question of construction whether an obligation entered into is absolute. In the present case it was an implied term of the contract that if it became an impossibility to obtain such a policy of insurance the mortgagees should not be entitled to rely on the mortgagors' failure to perform this part of the contract. The provision that if the mortgagors failed to keep the premises so insured the mortgagees might insure them at the mortgagors' expense shows that it was not contemplated by the parties that it might become impossible to do what was contracted to do. *In re Arthur. Arthur* v. *Wynne* (1) was a case in which the problem was somewhat similar to the present one, but it does not really cover these facts. Further, in all the circumstances the defendants are estopped from claiming to enforce this term of the contract. In any event they have waived performance of it.

*Charles Harman K.C.* and *L. M. Jopling* for the defendants. The mortgagees are entitled to enforce this term of the contract.

(1) (1880) 14 Ch. D. 603.

They advanced a considerable sum of money and without this insurance the security is not sufficient. The mortgagors are attempting to establish a partial frustration of the contract but the doctrine of frustration does away with the whole contract. You cannot hold that a part is frustrated. The Court cannot alter or modify the terms of the contract or adjust the rights of the parties. If it had been intended that this term should be unenforceable should insurance against war risks become impossible, it would have been easy to insert a proviso to that effect. As to estoppel, there were no representations on which the mortgagors acted to their detriment. Further, there was no consideration to support a waiver of this term of the contract.

As to the counterclaim, the Court is not debarred from giving the mortgagees the relief they seek. Under the Courts (Emergency Powers) Act, 1939, no express leave is required in any event for the appointment of a receiver: Annual Practice, 1940, p. 2868. Further, the mortgagors cannot be said to be unable to pay the mortgage debt within the meaning of s. 1, sub-s. 5, of the Act since the property can be sold for more than that amount.

*Gerald Gardiner.* The defendants are not entitled to open the counterclaim. To do so is to take a step in the proceedings for foreclosure and they have not applied by summons for leave in compliance with r. 14 of the Courts (Emergency Powers) Rules, 1939. In such circumstances as these a summons should have been taken out before the judge who was to hear the action.

*Charles Harman K.C.* "A step in proceedings for foreclosure" means an interlocutory step. Coming to trial once an action is set down for hearing cannot come within those words. No summons was necessary.

FARWELL J. [having stated the facts :] The whole matter comes down to this : Have the plaintiff company committed a breach of the covenant in the mortgage with regard to insurance, which would give rise to the right of the defendants to foreclose and recover their money, or is it, in the circumstances, the fact that there has been no such breach, and that, therefore, the defendants are not in a position to call in their money at once? It seems quite plain, when one reads the terms of the mortgage and considers what has happened, that prima facie there has been a breach of the covenant. The plaintiffs have never insured in such a way as to comply with it. Such an insurance could have been effected down to October, 1936, but there is no doubt from the evidence which I have heard, that since that date no reputable insurance company and no member of Lloyds would accept such a risk, and such a policy could not be procured. Therefore, it must be taken that as from October, 1936, full compliance with the terms of the covenant in question became impossible. In those circumstances is the plaintiff company relieved from the necessity of complying with it or is it still an enforceable covenant which they have failed to observe so as to give the defendants the right to recover their money immediately?

The plaintiffs have put their case, as I understand it, upon three grounds. It is not suggested, and I think quite properly, that this is a case of frustration of the contract in any true sense of the term, and the authorities on frustration, very rightly, have not been cited. The contract itself remains, but, according to the plaintiffs, one term of it has ceased to be enforceable. They say, in the first place, that it was an implied term of the contract when it was entered into that if such an insurance policy were ever an impossibility, neither side should be entitled to rely upon a failure to comply with that covenant. It is pointed out that the defendants are given the right to insure the premises themselves in the event of the plaintiffs failing to effect the necessary insurance, and it is said that it was clearly not in the contemplation of either of the parties at that time that such an insurance as was required by the covenant was something which could not be obtained. The very fact that the defendants were given the right to effect the policy themselves in the event of the failure of the plaintiffs to do so is an indication that neither side had it in mind that such a policy might not be capable of being effected at all. But, on the other hand, it appears to me to

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be extremely difficult in this case to come to the conclusion that there was any such implication as the plaintiffs suggest. They say that both parties intended the covenant to be read as though it were not to be enforced unless such a policy could be effected. If that had been the intention of the parties at the time there would have been no difficulty in inserting a proviso to give effect to it. No such proviso is to be found and I see no reason to infer any such intention on the part of either party at the date of the covenant. There was at that time and for some little time after no impossibility about effecting that form of insurance. In connection with this point, one has to bear in mind the position of the defendants. They were advancing a very large sum of money and were taking as security for it a charge upon land and buildings in the City of London. It was obviously of the greatest importance to them that the buildings should be insured for an adequate amount, so that if they were destroyed there would be a sum of money to represent them which would be available as security for the loan. One of the possibilities of destruction of the buildings in question was that of destruction by enemy action, and it is difficult to suppose that the defendants were willing to allow their money to remain on mortgage of buildings which were wholly unsecured so far as that particular risk was concerned. The fact that they were not so willing is, I think, apparent from the fact that they got a form of covenant providing in terms for the insurance against it. I find it impossible to see how in this case there was any such implication as is suggested. I cannot bring myself to think that the defendants ever contemplated that the particular portion of the covenant relating to insurance against enemy action was something which was only to be enforced if such insurance happened at a particular time to be obtainable. In my judgment, the defendants did intend to obtain the particular form of security for their money which would be provided by such an insurance, and I am not at all satisfied that they were ever prepared to allow their money to remain outstanding if that particular form of insurance was not obtainable. In my judgment, there is no ground whatever for saying that there was any such implied term in this mortgage as the plaintiffs seek to have read into it.

It is then said that, even if that be so, there is in this particular case an estoppel which prevents the defendants from setting up their claim. I confess I share the great difficulty which Sir William Jowitt very frankly said he felt with regard to this. There is nothing here which can amount to any sort of representation upon which the plaintiffs acted to their detriment, and so far as estoppel is concerned, I can see no justification whatsoever for such a suggestion.

The other ground upon which it is sought to escape from the difficulty is this. It is said that the defendants have waived the performance of this particular covenant and, therefore, can no longer enforce it. In my judgment, there has been no such waiver at all. No doubt the defendants did not appreciate that the form of the additional security was not wide enough to be a full compliance with the covenant, and they took no objection to that form of policy. It seems that both the plaintiffs' solicitors and the defendants' solicitors were under the same mistake of fact in thinking that the policy with the endorsement upon it was sufficiently wide. But apart altogether from that I can see no ground for suggesting, even if the defendants were willing to permit the policy to remain in that form for a year or two years, that they waived their right to a strict performance of the covenant. Indeed, even if there was any such waiver, it was supported by no consideration whatever, and clearly could not be enforced against the defendants in all the circumstances.

That being so, it is, in my judgment, quite a plain case of a breach by the plaintiffs of the terms of the covenant in question. One appreciates the hardship upon the plaintiffs. They have entered into a covenant which they are unable to perform; their position is one of great difficulty, and one feels, if I may say so, sympathy with them. But, on the other hand, one must take the point of view of the defendants. I know not whose was the money advanced on mortgage. I will assume for the moment that it was trust money. On that assumption the defendants invested money which they held on trust in a 4 per cent. security which they thought was safe for that purpose. The safety of the security necessarily depended very largely upon the protection of the property by the proper and necessary insurance and, therefore, it was vital to the defendants to see that a wide enough covenant was put into the mortgage to cover all risks. If they were bound to allow their money to remain out on mortgage for the full period and had no remedy notwithstanding the fact that one of the terms of the mortgage, which enabled them to feel reasonably secured, was no longer enforceable, it would put them into a position of the greatest possible difficulty should the buildings be unfortunately destroyed and the security for their money very largely disappear.

It seems to me that the position is this. The plaintiffs and the defendants entered into a contract under which the plaintiffs agreed and covenanted to do certain things. They failed to carry out their covenant (not, as it happens, through any fault of their own) and as a result of that failure the defendants were put in a position in which they could call in their money. In my judgment, that was something which the defendants were entitled to do, and accordingly the plaintiffs are not entitled to the relief which they seek in this action by the form of declaration which they ask. They, unfortunately for them, have failed to comply with one of the covenants in the mortgage and the result follows that the defendants are in a position now to call in their money, as they have done. So far, therefore, as the action itself is concerned, the plaintiffs, in my judgment, have failed to establish their right to the relief which they sought and, accordingly, the action must be dismissed with costs.

That leaves the question of the counterclaim to be considered. By the counterclaim the defendants seek an account of what is due under the mortgage payable by the plaintiffs to them; payment of the sum of 155,000*l.* with interest; that the mortgage and registered charge may be enforced by foreclosure or sale; the appointment of a receiver and delivery of possession of the mortgaged premises. To that, objection has been taken under the Courts (Emergency Powers) Act, 1939, and it is said that the defendants are not entitled to proceed with their counterclaim at all because they have not taken the step which, the plaintiffs say, it was necessary for them to take before they could proceed, namely, an application by summons under the Courts (Emergency Powers) Rules, 1939, r. 14, for leave to proceed. That is based on s. 1, sub-s. 2, which provides: "Subject to the provisions of this section, a person "shall not be entitled, except with the leave of the appropriate "court, . . . . (*b*) to institute any proceedings for foreclosure "or for sale in lieu of foreclosure, or take any step in any such "proceedings instituted before the commencement of this "Act." These proceedings (that is the counterclaim) were instituted before the commencement of the Act and, therefore, in order to bring this case within its prohibition, it is necessary to establish that by proceeding to the hearing of the counterclaim the defendants (the plaintiffs to the counterclaim) were taking a step in the proceedings. Whether that is so or not must depend upon what is meant by the words "take any "step." In my judgment, they do not refer to the hearing of an action or counterclaim which was set down and ready for trial before the Act came into force. Taking "any step in "any such proceedings" means taking any interlocutory step before the action gets to the stage where it is set down and ripe for trial. Once the action is set down it is no longer possible to take out a summons before the Master in the proceedings; the matter has passed out of his hands and I cannot bring myself to think that the Act contemplated that a summons should be taken out before the judge who is going to hear the action and the counterclaim. In my judgment, that is not what was intended by this Act. There is nothing to prohibit the opening and the hearing of this counterclaim. No doubt if, as the result of the hearing, an order is made for relief such as sale or foreclosure, the right to proceed to enforce the judgment so obtained is something which the Act requires shall only be done with the sanction of the Court. But this action was commenced before the Act came into operation. It was ready, in the sense that all the necessary preliminary steps had been taken and it had been set down and was waiting for trial. There is nothing which prevents it coming on for trial and being heard by the judge without any leave under this Act, although, as I said, the right to enforce any judgment so obtained is something which the plaintiff can only obtain by leave of the Court as provided by this Act.

If that be so, it follows that the defendants are entitled to judgment on the counterclaim. They are entitled to the account which they seek and to the appointment of a receiver, because the Act itself does not necessitate any express leave for that. They are also entitled to an order for foreclosure nisi, but they cannot proceed either by foreclosure absolute or to enforce the judgment by sale. Before they can take such steps they must obtain the leave of the Court by a summons, as provided by the Act.

The relief to which I consider the defendants are now entitled is relief which, in my judgment, I can give them, and there is nothing in the Act which disentitles them to it. The whole object of the Act is to prevent a person, or persons, from enforcing a judgment against a defendant without the leave of the Court, without giving him an opportunity of showing that his failure to pay the debts which he owes or to satisfy the judgment, is due directly or indirectly to the war. There is nothing, in my view, which prevents a plaintiff in such a case as this obtaining an order for an account or for foreclosure nisi or for the appointment of a receiver.

In those circumstances I propose to give the defendants that relief, and the plaintiffs must pay the costs of the counterclaim.

Solicitors: *J. D. Langton & Passmore; Trower, Still & Keeling.*

F. C.

## SCOTT *v.* FRANK F. SCOTT (LONDON), LIMITED.

BENNETT J.

1940
Jan. 11, 12, 15, 16.

[1939. S. 823.]

*Company—Articles of association—Rectification—Jurisdiction—Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 14, 243—*Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 20, 314.

The Court has no jurisdiction to rectify the articles of association of a company even if those articles do not accord with what is proved to have been the concurrent intention of the signatories to them at the moment of signature.

*Evans* v. *Chapman* [1902] W. N. 78; 86 L. T. 381 discussed and followed.

A COMPANY, Frank F. Scott (London), Ld., was incorporated on October 12, 1926, as a private company, and its incorporation was effected under the Companies Acts, 1908-1917. It had a share capital of 10,500*l.*, divided into 10,200 preference shares of 1*l.* each and 300 ordinary shares of 1*l.* each, and to the preference shares there were attached, by the memorandum of association, these rights: "(1.) The holders of the said "preference shares shall be entitled to a fixed cumulative "preferential dividend at such a rate as shall after deduction "of income tax at the rate for the time being in force yield a "clear 15*l.* net per centum per annum on the capital for the "time being paid up on the said preference shares. (2.) The "holders of the said preference shares shall in a winding up "have priority as to return of capital and payment off of "arrears of the said preferential dividend, whether declared "or earned or not up to the commencement of the winding up "over all other shares in the capital for the time being of the "company, but shall not have any further right to participate "in profits or assets."

The company was formed to take over a business of shipping butchers carried on in partnership in London by three brothers, Stuart Arthur Scott, Reginald Scott and Frank Stanley Scott. Frank Stanley Scott and Reginald Scott were also interested in a similar kind of business carried on in Liverpool where they were in business, the business which the defendant company was formed to carry on immediately before the defendant company was formed being managed on behalf of the partnership by the defendant Stuart Scott. The company was a private company, and it adopted as its articles of association Table A in the First Schedule of the Companies (Consolidation) Act, 1908, with certain modifications, and the whole of the share capital, both preference and ordinary, was issued to the three brothers in equal shares; they each had one-third of the 10,200 preference shares and each had 100 ordinary shares allotted to them.

The control of the company was in the hands of the ordinary shareholders, the preference shareholders only having a right of voting at a general meeting upon such questions as reduction of capital, winding up of the company, sanctioning a sale of the undertaking or altering the regulations of the company so as to affect directly the rights of the preference shareholders.

Frank Stanley Scott died on September 10, 1937, and his widow, who was the sole executrix of his will, became entitled thereunder to all his preference shares and to all his ordinary shares. There was no question with regard to her rights to the preference shares, but she claimed the right to be placed on the register of members in respect of his ordinary shares. The two brothers, however, claimed that, under the articles of association, she was bound to offer to them her testator's ordinary shares and that they had the right to acquire them at par.

She therefore commenced an action against the company, Stuart Arthur Scott and Reginald Scott, in which she sought a declaration that she was entitled to have her name entered on the register of members of the company as the holder of 100 ordinary shares in it.

The defendants in their counterclaim sought a declaration that, upon the true construction of the articles of association, the personal defendants had the right to acquire from the plaintiff these 100 ordinary shares at par, and, if the construction they asked the Court to put upon the articles of association should not be the correct construction, then they sought rectification of the articles, so as to give to them the right to acquire from the plaintiff these 100 ordinary shares at par.

His Lordship held, on the construction of the articles, that the plaintiff was not entitled to the declaration which she sought and that the action failed. With regard to the counterclaim he held that the personal defendants were, on the construction of the articles, entitled to a declaration that they had the right to acquire the 100 ordinary shares at par.

The question of the jurisdiction of the Court to rectify the articles, which is the sole question material for the purpose of this report, was also argued before his Lordship and dealt with in his judgment.

*Charles Harman K.C.* and *E. M. Winterbotham* for the defendants. With regard to the counterclaim for rectification, the articles should, on the facts, be rectified. The Court does not look at the words, but at the spirit of the document: see *Burroughes* v. *Abbott* (1); *Jervis* v. *Howle and Talke Colliery Co., Ld.* (2) The law on rectification is summed up in a general way in *Shipley Urban District Council* v. *Bradford Corporation.* (3)

When the true intention of the parties has not been expressed the deed is not the deed of the parties until that intention has been expressed. When parties execute a deed in the wrong form that is not the deed of the parties. The parties must not be bound to a palpable blunder because the agreement is filed at Somerset House. [They referred to Buckley On The Companies Acts, 11th ed., p. 36; and to *Hall-Dare* v. *Hall-Dare* (4); *Meeking* v. *Meeking* (5); *Welton* v. *Saffery* (6); and *Clark* v. *Barnes.* (7)]

*D. L. Jenkins K.C.* and *Maurice Berkeley* for the plaintiff. The Court has no jurisdiction to rectify the articles of association of a company. Since the first Joint Stock Companies Act—the Act of 1862—the Court has only been asked to rectify articles in one reported case, i.e., *Evans* v. *Chapman.* (8)

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(1) [1922] 1 Ch. 86.
(2) [1937] Ch. 67.
(3) [1936] Ch. 375.
(4) (1885) 31 Ch. D. 251.
(5) [1917] 1 Ch. 77.
(6) [1897] A. C. 299, 315.
(7) [1929] 2 Ch. 368.
(8) [1902] W. N. 78; 86 L. T. 381.

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The only contract is a statutory contract and that includes the company. The statutory contract is a contract by reference to the registered document and nothing else: see *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association.* (1)

The memorandum and articles of a company are documents of such a character that there is no room for rectification because (1.) when the company comes into existence the duly registered articles with such provisions of Table A as are applicable become the regulations of the company—see s. 11 of the Companies (Consolidation) Act, 1908; and (2.) the statutory contract, by s. 14 of the Act of 1908, does not depend on intentions and aims, and one of the parties is the company itself, which is not in existence until the memorandum and articles have been registered.

Assuming that rectification is possible, there is no machinery to carry it into effect.

*E. M. Winterbotham* in reply.

BENNETT J. There remains the question of counterclaim, which raises interesting points of law. I suppose that this matter will not remain in this Court and that the plaintiff will go to the Court of Appeal. There, of course, my judgment may be reversed, and then it will become necessary for the Court to consider the claim by the defendants to have the articles of association rectified. With reference to that claim the first ground of objection taken by Mr. Jenkins, on behalf of the plaintiff, is that the equitable jurisdiction of the court of equity to rectify instruments does not extend to articles of association. That defence is based upon the provisions to be found in some of the sections of Part I. of the Companies Act, 1908, under the authority of which the defendant company was incorporated, and it is necessary to consider the statutory provisions.

[His Lordship referred to ss. 2, 3, 6, 7, 9, 10, 11, 12, 14, 15, 16, and 17, and continued :]

Those, I think, are all the relevant provisions in the statute.

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(1) [1915] 1 Ch. 881, 900.

So far as authority is concerned, during all the years since 1862, when the first Joint Stock Companies Act was passed, there has apparently been only one reported case in which the question whether articles of association could be rectified has been considered, and that is the case of *Evans* v. *Chapman.* (1) In that case upon a motion Joyce J. refused to rectify articles of association in a case in which it had been plainly proved that there was a mistake in them. The articles of association, which were those of a public company, contained an article which provided that: "If the company shall offer "any of its shares to the public for subscription: (*a*) the "directors shall not make any allotment thereof unless and "until at least 7 per cent. of the shares so offered shall have "been subscribed, and the sums payable on application shall "have been paid to and received by the company." There was clear proof that the words "per cent." had been inserted in the article by a mistake of the printers. Nevertheless Joyce J. refused to rectify. The matter came before him in rather a curious way. An action was begun by one of the seven signatories to the memorandum and articles against the other six and against the company, and in that action a motion was made for some interlocutory relief. I do not know what the interlocutory relief there was or what it could have been or how it could have been anything except the relief which the plaintiff, if he was entitled to it, would be entitled to at the trial, obviously a matter I should have thought not for interlocutory relief. The matter was, however, argued, and Joyce J. is reported as having said in his judgment: "I do not see my "way to make the order asked for. No doubt a blunder "was made in drafting the articles, but that can be rectified "under the provisions of section 50 of the Companies Act "1862 and is the proper way of doing it"—as if the signatories had passed the special resolution to alter the articles—"With "reference to the jurisdiction to rectify such a document, "counsel have not had much time or opportunity to look into "the authorities on the subject; but on the materials before "me and as at present advised, I am of opinion that the

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(1) [1902] W. N. 78; 86 L. T. 381.

"general jurisdiction of the court to rectify instruments has "no application to a document of this kind, which has only a "statutory effect, and can only be rectified by statutory "authority."

It is said on behalf of the defendants (the plaintiffs in the counterclaim) that that language is so guarded that it ought not to be taken as an authority in favour of the proposition that there is no jurisdiction to rectify articles of association. Of course, it is plain that Joyce J. did use very guarded and qualified language, but it does nevertheless express the view that the general jurisdiction of the Court to rectify instruments has no application to articles of association. That is the only authority.

Looking at the matter apart from authority, in my judgment, the arguments advanced by Mr. Jenkins on behalf of the plaintiff are to be preferred to those advanced by Mr. Harman and Mr. Winterbotham on behalf of the defendants. The statute says by s. 14 that articles of association when registered shall bind not merely the persons who put their signatures to them, but the company, the company which had no existence at the time when by mistake, if they did make a mistake (and for this purpose I assume they did), those who put their signatures to the articles of association omitted to make in them a certain provision. How can their mistake be put right as against the company which, when its signatories made a mistake, had no existence at all, when the statute says that the articles when registered shall bind the company? It seems to me that the effect of the statute upon the company as stated in s. 14 is such as to make the equitable jurisdiction of the Court in regard to rectification inapplicable to the articles of association of a company incorporated under the provisions of the Companies Act.

Apart from the language of s. 14, there are other difficulties in the way of acceding to the defendants' argument. If rectification should be ordered, the Court ought to see that the articles of association, that is to say the document registered with the registrar, are made to conform to the Court's order. The registrar is not before the Court. There is no jurisdiction in the Court to order the Registrar of Joint Stock Companies to correct the articles of association filed by him under the Act. It would be idle, I think, for this Court to make an order which this Court has no power to enforce. Whenever the memorandum of a company registered under the Companies Acts is altered as the result of an order of the Court exercising a statutory authority conferred upon it, e.g., if the objects of a company are altered or if the capital of a company is reduced, the statute contains provisions authorizing or, indeed, compelling the registrar to make a note upon the register of the order which the Court has made in regard to those matters. When one considers the provisions of s. 243 of the Act of 1908, provisions which have found their way into the Companies Act, 1929, to the effect that the register is open to inspection, that copies of the documents on the register can be obtained by members of the public and that copies certified by the registrar to be true copies are admissible in legal proceedings as legal evidence, it is of vital importance, if the articles of association are to be rectified, that the instrument on the file should be altered so as to conform to the Court's order. There is no jurisdiction to enable that to be done. For these reasons, in my judgment, the Court has no jurisdiction to rectify articles of association, even although it should be proved that the articles of association do not accord with what is proved to have been the concurrent intention, at the moment of their signature, of the signatories to them.

In this case, so far as the facts are concerned, I think it has been proved by the documents which have been put in that it was the intention of the three brothers that these articles of association should contain a provision that the ordinary shares held by a deceased member should be offered at par to the principal shareholders defined by the articles, and apart from this technical difficulty of being unable to rectify articles of association, I should have been of opinion that the defendants had proved the facts necessary to support an action for rectification if I had come to the conclusion that, as a matter of construction, the articles did not give the principal

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shareholders the right to acquire from a deceased shareholder his ordinary shares.

In my judgment, the counterclaim of the defendants succeeds in so far as they ask for a declaration as to the construction of the articles, but fails in so far as they ask for the articles of association to be rectified.

Solicitors: *Field, Roscoe & Co., for Guy Williams & Co., Liverpool; Layton & Co.*

J. L. D.

# BISMAG, LIMITED *v.* AMBLINS (CHEMISTS), LIMITED.

SIMONDS J.

1939 Dec. 8, 11, 21.

[1939. B. 403.]

*Trade mark—Infringement—Proprietary medicine—Published formula—Advertisement of competing article—Mark referred to in pamphlet for price comparison—Not used in reference to proprietor of mark or to goods so marked—No infringement—Trade Marks Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 4, 68, *sub-s.* 1.

Under the Trade Marks Act, 1938, s. 4, the registration of a person in Part A of the register as proprietor of a trade mark in respect of any goods, shall if valid give that person the exclusive right to the use of the trade mark in relation to those goods, and the right is to be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof by way of permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either (*a*) as being use as a trade mark; or (*b*) in the case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

The B. company were the owners of a trade mark in the word " bisurated " as applied to " bisurated magnesia," a proprietary medicine sold under a published formula. The A. company, who were manufacturing chemists and retailers, made and sold a similar preparation which they called " bismuthated magnesia." The A. company published a pamphlet containing a list of various proprietary medicines made to formula, including bisurated magnesia, and opposite to this list a number of medicines made by them, said to be similar in all respects to the proprietary medicines, but sold, as stated, at a much lower price. In an action by the B. company against the A. company for an injunction to restrain infringement of their mark:—

*Held*, that the pamphlet, having mentioned the trade mark " bisurated " only as applying to the plaintiffs' and not the defendants' goods was not an infringement of the plaintiffs' trade mark in the word " bisurated " within the Trade Marks Act, 1938, s. 4.

*Irving's Yeast-Vite* v. *Horsenail* (1934) 50 Times L. R. 205; 51 R. P. C. 110 discussed.

WITNESS ACTION.

The plaintiffs, Bismag, Ld., were manufacturing chemists, and made and sold through retailers a largely advertised proprietary medicine consisting of a compound of bismuth and magnesia with other ingredients. They were the owners of the registered trade mark "bisurated" for this compound, which was sold as "bisurated magnesia," in tablets and powder.

The defendants, Amblins (Chemists), Ld., were also manufacturing chemists, but sold their goods in their own retail shops, in which they also offered for sale various proprietary medicines, including the plaintiffs'. They issued an advertising pamphlet in which they claimed that most patent medicines were sold at too high a price. In this, in parallel columns, they gave a list of well known proprietary medicines with the formula to which each was made and the price, and opposite to these a list of medicines prepared by them, made in every case to similar formulæ, and sold at lower prices. In the case of the plaintiffs' preparation the left-hand column read "Bisurated magnesia tablets. Analysis. Bismuth Carb. Soda "Carb. Magnesia Carb. Price 1*s.* 3*d.* for about 50 tablets." The right-hand column, opposite to this, describing the defendants' preparation read "Bismuthated magnesia. Analysis "(similar to the plaintiffs'). Price, 30 tablets, 6*d.*, 75 tablets, 1*s.*" The plaintiffs also sold bisurated magnesia in powder form, and the defendants offered for sale a competing preparation. The defendants also sold the plaintiffs' among other proprietary medicines, but made the fact that their own medicines were cheaper, prominent.

The plaintiffs brought this action to restrain the defendants from publishing this pamphlet as being an infringement of their trade mark.

*R. E. Burrell* K.C. and *J. Mould* (for *R. A. B. Shaw*, on war service) for the plaintiffs.

Under the Trade Marks Act, 1938, s. 28, the reference to the use of a mark means of a printed or other visible mark in physical or other relation to the goods. The words of the

Trade Marks Act, 1905, were "in connection with the "goods."

The defendants' pamphlet is an advertising circular or other advertisement issued to the public within the meaning of s. 4, and its publication is an infringement of the plaintiffs' mark. The section makes sweeping changes in the law, and infringement may be committed in circumstances which were inconceivable under the previous law, such as putting one's own trade mark on goods protected by a mark. It cannot be construed by reference to any previous conception of a trade mark. The defendants are using our trade mark for the purpose of identifying the plaintiffs' goods and comparing their own with them. For anyone to say that his preparation is made to the same formula as "bisurated magnesia" is an infringement under s. 4 of the Act. It is in effect trading upon our advertisements. The defendants admit that their circular would be of no value to them without the reference to "bisurated magnesia," for the formula, by itself, conveys little information to the public. It is what the section was intended to prevent. The decision in *Irving's Yeast-Vite* v. *Horsenail* (1) would have been in favour of the plaintiffs if the action had been brought after the Trade Marks Act, 1938.

*B. L. A. O'Malley* for the defendants. Assuming that the word "use" refers to use in an advertisement, the defendants are amply protected by the proviso in s. 4, sub-s. 3 (*a*). They are entitled to refer to the plaintiffs' preparation in the circular along with their own, for a comparison of price. It is exactly the same as if they had put the plaintiffs' goods side by side with their own in their shop window. A mere reference to the plaintiffs' goods is not enough, if sub-s. 3 (*a*) is to be given its full meaning.

If the words in para. (*a*) are to be taken by themselves in their literal meaning, it would be impossible to sell anything at all under the trade mark. Some such words as "not "being goods of the registered proprietor" must be read into the sub-section: see *Abbey Sports Co., Ld.* v. *Priest*

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(1) 50 Times L. R. 205; 51 R. P. C. 110.

*Bros.* (1) The words in (*b*) "importing a reference" must mean something more than "referring to." I submit they mean "importing into the description a reference." It is only by giving the words that meaning that the mischief which the statute was designed to meet is counteracted.

The plaintiffs are not inviting any purchaser to believe that he is purchasing "bisurated magnesia" if he buys the defendants' bismuthated magnesia. The original pamphlet was withdrawn and the new edition of it was carefully edited so as to comply with the Trade Marks Act, 1938, before it came into force. The word "bismag" is in common use in the chemical trade to denote compounds of bismuth and magnesia.

*R. E. Burrell K.C.* replied.

*Cur. adv. vult.*

1939. Dec. 21. SIMONDS J. The plaintiffs, who carry on the business of the manufacture and sale of medicinal preparations, are the registered proprietors of trade mark No. 340,411, registered as of February 20, 1912, in class 3 (Schedule III.), in respect of "A medicinal stomachic powder "for human use," and of trade mark No. 561,459, registered as of July 11, 1935, in the same class, in respect of "Chemical "substances prepared for use in medicine and pharmacy." Each of the trade marks consists of the word "Bisurated."

The defendants also carry on the business of the manufacture and sale of medicinal preparations. They sell preparations not only of their own manufacture, but also of other manufacturers, including the plaintiffs.

This action is brought, first, to restrain infringement of the registered trade mark, thereby raising a question of general importance under the Trade Marks Act, 1938, and, secondly, to restrain passing-off at common law.

The infringement of trade mark of which the plaintiffs complain is in a pamphlet issued by the defendants. There have been more than one edition of this pamphlet. For the purpose of this case I will take the edition of which a specimen is the exhibit "p. 4." The earlier edition appears to have been superseded and the defendants do not threaten or intend to issue it.

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(1) (1936) 53 R. P. C. 300, 304.

This pamphlet has been prepared with some care in such a manner as will, if its author's hopes are fulfilled, escape the consequences of the Trade Marks Act. It opens with an attack on patent medicines: "Some plain truths about "patent medicines. Read the enclosed and you will save "yourself money. Safeguard your health and be much "happier as thousands of other people have proved for "themselves by taking Amblins' famous medicines. For "too many years have sufferers been exploited by manu"facturers of branded medicines and charged shillings for "medicines which cost pence to make." Then follows in large type: "Amblins guaranteed prescriptions are now to "be obtained in 6*d.*, 1*s.* and 2*s.* sizes." In the body of the pamphlet there is much more in the same vein. It is pointed out that many of the greatly advertised medicines are made according to well known formulas that millions of pounds are spent in advertising them, that every penny spent in advertising is paid for by a credulous public in the form of exorbitant prices, and that precisely the same article can be supplied by the defendants at a very much lower price. The final exhortation is: "If you want the original advertised "remedies, we can supply them to your order at the full "prices. If you want Amblins' remedies, order by number "or by Amblins' own name." This is followed by some pages in which are set out in two columns, the left headed "List of "advertised patent medicines sold by us," and the right headed "Amblins' Medicine (Brand) Prescriptions," first, some well known branded medicine with its analysis or ingredients and prices, and then, immediately opposite to it, under a prescription number, the defendants' corresponding preparation, usually with a description or fancy name, but sometimes only with a number, and having also usually an identical analysis or statement of ingredients and a statement of price, which is in every case lower, and often very much lower, than that of its opposite number. In the particular case of the plaintiffs' preparation the left column reads: "Bisurated Magnesia Tablets. Analysis: Bismuth Carb. Soda Carb. Magnesia Carb. Excipient. Price, 1*s.* 3*d.* for "about 50 tablets." The right column reads: "Prescription "No. 7. Bismuthated Magnesia Tablets. Analysis: Bismuth "Carb. Soda Carb. Magnesia Carb. Excipient. Price, 30 "tablets 6*d.*, 75 tablets 1*s.*" The plaintiffs' preparation in powder instead of tablets is similarly treated.

This is the alleged infringement of the plaintiffs' trade mark "Bisurated." It will be noted that the defendants do not by any means seek to describe goods of their own manufacture by the plaintiffs' mark. On the contrary, they emphasize the distinction between their own and the plaintiffs' goods, saying in effect to the public: "You can "have the plaintiffs' goods, or ours; ours are just the same "as theirs and are much cheaper." The plaintiffs complain that the defendants are deliberately taking advantage of the publicity which extensive advertisement of bisurated magnesia has gained in order to sell their own goods, and claim that thereby their statutory right has been infringed.

I do not doubt that the defendants get the benefit of the plaintiffs' advertisement. It is not my province to say whether there is any impropriety in such a course. I am concerned only to determine whether the plaintiffs' statutory rights under s. 4 of the Trade Marks Act, 1938, have been invaded. I must, however, observe that the right now claimed is something very different from the protection previously given to trade marks by statute or by common law. It was not inaptly described by counsel for the plaintiffs as being something akin to a limited form of copyright. It is a claim which, if it is valid, must have far-reaching consequences. I see, indeed, no limit to the interference with trading heretofore counted legitimate which its assertion might not cause. Nor is there any logical reason why this new form of protection should be accorded to trade marks rather than to all forms of advertised goods. If the assertion by a maker of stout that his product is as good as Guinness's stout but cheaper, or by a maker of soap that his product is as good as Pears' soap but cheaper, is an attack from which the proprietors of these widely advertised goods ought to be protected, it is a wholly irrelevant consideration whether any part of the name "Guinness's Stout" or "Pears' Soap" is a statutory trade mark. If such a right is, for the first time, to be annexed to a trade mark, it must, in my judgment, be created by clear words.

It is necessary for the consideration of this question that I should look back to the earlier law. By s. 3 of the Trade Marks Act, 1905, a trade mark was defined as a "mark used "or proposed to be used upon or in connexion with goods "for the purpose of indicating that they are the goods of "the proprietor of such trade mark by virtue of manufacture, "selection, certification, dealing with, or offering for sale." By s. 39 the rights of the registered proprietor of a trade mark are thus defined: "Subject to the provisions of section 41 "of this Act and to any limitations and conditions entered "upon the register, the registration of a person as proprietor "of a trade mark shall, if valid, give to such person the "exclusive right to the use of such trade mark upon or in "connexion with goods in respect of which it is registered . . . ." This being, under the then existing law, the statutory right of a registered proprietor of a trade mark, in the year 1933 Irvings' Yeast-Vite, Ld., the registered proprietors of a trade mark "Yeast-Vite," brought an action against F. A. Horsenail (trading as the Herbal Dispensary), *Irving's Yeast-Vite* v. *Horsenail* (1), to restrain an alleged infringement of their trade mark, which consisted of a sale by the defendants of their own wares under the label "Yeast Tablets, a substitute "for Yeast-Vite." The defendant, justly thinking perhaps that the matter was too clear for argument, did not appear at any stage of the proceedings, in the course of which it was unanimously held by Bennett J., the Court of Appeal, and the House of Lords that there had been no infringement.

Two passages from the speech of Lord Tomlin in the House of Lords may be cited (2): "This is clearly a use of the word "'Yeast-Vite' on the respondent's preparation to indicate

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(1) 50 Times L. R. 205; 51 R. P. C. 110.
(2) 50 Times L. R. 207; 51 R. P. C. 115.

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"the appellants' preparation and to distinguish the respondent's "preparation from it. It is not a use of the word as a trade "mark—that is, to indicate the origin of the goods in the "respondent by virtue of manufacture, selection, certification, "dealing with or offering for sale." And later: "The phrase "'the exclusive right to the use of such trade mark' carries, "in my opinion, the implication of use of the mark for the "purpose of indicating in relation to the goods upon or in "connexion with which the use takes place the origin of such "goods in the user of the mark by virtue of the matters "indicated in the definition of 'trade mark' contained in "section 3."

In this state of the law a departmental committee appointed by the President of the Board of Trade made in the year 1934 a report on the law and practice relating to trade marks. I was invited to look at this report, and did so, for the purpose of learning what was the state of the law—a matter on which I was better able to inform myself from other sources—and what were the supposed defects in it. I declined to consider what proposals or recommendations the committee made. That appears to me a wholly illegitimate method of approach to the construction of an Act of Parliament. Whether and to what extent Parliament thought fit to remedy the supposed grievances of owners of trade marks must depend on the true meaning of the Act of 1938, in the interpretation of which I cannot be guided by what the committee thought should be done.

The Trade Marks Act, 1938, introduced numerous changes into the law. A new definition of "trade mark" is to be found in s. 68, sub-s. 1: "'trade mark' means, except in "relation to a certification trade mark, a mark used or proposed "to be used in relation to goods for the purpose of indicating, "or so as to indicate, a connexion in the course of trade between "the goods and some person having the right either as "proprietor or as registered user to use the mark, whether "with or without any indication of the indentity of that "person. . . ."

The first difference between this and the earlier definition is the substitution of "in relation to" for "upon or in "connexion with." I do not think that a different meaning can be attached to the different words. The second difference is in that which the mark indicates. In the earlier definition the mark indicated in effect the origin of the goods; in the later it indicates a "connexion in the course of trade between "the goods and some person." This difference may have been necessitated by some of the changes introduced into the law, particularly with regard to assignment of trade marks. It cannot, in my judgment, have any bearing on the essential nature of a trade mark. I turn, then, to s. 4, which takes the place of s. 39 of the Act of 1905, and enacts what are the rights given by registration. It is, so far as relevant, in these terms: "(1.) Subject to the provisions of this section, and "of sections seven and eight of this Act, the registration . . . . "of a person . . . . as proprietor of a trade mark . . . . in respect "of any goods shall, if valid, give or be deemed to have given "to that person the right to the exclusive use of the trade "mark in relation to those goods, and without prejudice to "the generality of the foregoing words, that right shall be "deemed to be infringed by any person who, not being the "proprietor of the trade mark or a registered user thereof "using by way of the permitted use, uses a mark identical "with it . . . . in the course of trade in relation to any "goods in respect of which it is registered and in such manner "as to render the use of the mark likely to be taken either— "(*a*) as being use as a trade mark; or (*b*) in a case in which "the use is use upon the goods or in physical relation thereto "or in an advertising circular or other advertisement issued "to the public, as importing a reference to some person having "the right either as proprietor or as registered user to use the "trade mark or to goods with which such a person as aforesaid "is connected in the course of trade." I need not set out sub-s. 2, but sub-s. 3 is material: "(3.) The right to the use "of a trade mark given by registration as aforesaid shall not "be deemed to be infringed by the use of any such mark as "aforesaid by any person: (*a*) in relation to goods connected "in the course of trade with the proprietor or a registered

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"user of the trade mark if, as to those goods or a bulk of which "they form part, the proprietor or the registered user conforming to the permitted use has applied the trade mark and "has not subsequently removed or obliterated it, or has "at any time expressly or impliedly consented to the use "of the trade mark." I do not think that I get any assistance from any other sections of the Act. The question arises on the true construction of s. 4 alone—whether the statutory right of the proprietor of a trade mark has been enlarged so as to make that an infringement which, under the old law, would not have been an infringement. That this is so is the contention of the plaintiffs' counsel, who submit that *Irving's Yeast-Vite, Ld.* v. *Horsenail* (1), if it had to be decided under the new law, must be decided in favour of the plaintiff company.

I have already expressed the view that a "trade mark," under the new law, is what it was under the old law, so far, at least, as the questions raised in this case are concerned. It does not, however, follow that the statutory right of the owner of that form of property may not be very different. The language of s. 4 is involved and difficult to construe. If sub-s. 1 had stopped at the words "in relation to those goods," there would be little difficulty; so far there is little difference between the language of s. 4 and that of the old s. 39, and it would not have been possible, in my judgment, to hold that any larger right had been created by the new Act than by the old. I could have come to no other conclusion (taking the facts of the present case) than that the user of the word "bisurated" by the defendants would not be an infringement of the plaintiffs' trade mark, unless it indicated goods as originating from, or connected in the course of trade with, the plaintiffs, when in fact they did not so originate or were not so connected. This seems to me as clear as was the meaning of the old s. 39. The sub-section, however, proceeds to particularize what is to constitute an infringement of the exclusive right created by its earlier words. This part of the sub-section is introduced by the words "without prejudice

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(1) 50 Times L. R. 205; 51 R. P. C. 110.

"to the generality of the foregoing words," and these words, while apt to introduce some right or privilege with regard to which there might be some doubt as to its falling within the ambit of the general words, are infelicitous if they preface the creation of a right which could not, on any fair reading of the general words, be carried by them, and which, as I have already observed, is something very different from any form of privilege or protection previously given by statute or common law to the owner of a trade mark.

The claim in the present case is that the defendants have used an identical mark, that is, "Bisurated," in the course of trade "in relation to" goods in respect of which it is registered and in such manner as to satisfy the conditions of either sub-clause (*a*) or sub-clause (*b*), the words of which need not be at this stage repeated. It is first to be observed that two conditions are to be fulfilled. First, the word "Bisurated" must be used "in relation to" goods in respect of which it is registered; secondly, it being used in relation to such goods, it must be used in such manner as to fall within sub-clause (*a*) or sub-clause (*b*). First, then, have the defendants used the mark "Bisurated" in relation to any goods in respect of which it is registered? Clearly they have, they advertise the sale of the plaintiffs' goods, "Bisurated Magnesia." Is it, then, in relation to those goods or to some other goods that they use the mark? Clearly it is in relation to those, the plaintiffs' goods, that they use the mark. It is true that in the same advertisement they offer to sell their own goods, "Bismuthated Magnesia," and that their offer is in immediate juxtaposition to the advertisement of the plaintiffs' goods. But it does not seem to me a fair use of language to say that the mark "Bisurated" is used "in relation to" the defendants' goods any more than the word "Bismuthated" is used in relation to the plaintiffs' goods. If the true construction is that "Bisurated" has been used by the defendants only in relation to the plaintiffs' own goods, they are protected by sub-s. 3. In my judgment, the plaintiffs do not establish that the defendants have satisfied the first condition of infringement.

It is, however, possible that what appears to be the plain meaning of the first sentence of that part of the sub-section which I am considering may be displaced by the necessary implication of the latter part of it, so that, reading the sub-section as a whole, I must conclude that the words " in "relation to any goods " have a wide meaning and that (to proceed from the general to the particular) the word "Bisurated " in the defendants' pamphlet is used in relation to the defendants' goods as well as to the plaintiffs' goods, in which case the defendants would not get the benefit of sub-s. 3. I turn, then, to the second condition in sub-s. 1. It is couched in such difficult language that one may well hesitate to say that it has any very clear implication. First, one must consider sub-clause (*a*) and ask : " Is the use of the "mark such as to render it likely to be taken as being use as "a trade mark ? " If I understand the plaintiffs' contention, they do not say that the defendants' use of the word "Bisurated " is " likely to be taken as being use as a trade "mark." Truly, one may pause to wonder at an enactment which, for the protection of a trade mark, appears to prohibit the use of a mark not only as a trade mark, but also as something else. To this, however, the sub-division into (*a*) and (*b*) necessarily points, and it is, no doubt, on this that the plaintiffs rely as an answer to the general criticism on the nature of their claim, which appears in the earlier part of my judgment. I read once more the relevant words : " that right shall be "deemed to be infringed by any person who not being the "proprietor of the trade mark . . . . uses a mark identical "with it . . . . in relation to any goods in respect of which "it is registered and in such manner as to render the use "of the mark likely to be taken "—then I put the following words in brackets in order to emphasize them—(not as being use as a trade mark, but) " (*b*) in a case in which the use "is use upon the goods or in physical relation thereto or in an "advertising circular or other advertisement issued to the "public, as importing a reference to some person having the "right either as proprietor or as registered user to use the "trade mark, or to goods with which such a person as aforesaid "is connected in the course of trade."

In relation to the fact of the present case the question may be thus put: "Does the use by the defendants of the word "'Bisurated' in their pamphlet constitute a use by them "of the mark in relation to goods in respect of which it is "registered in such manner as to render the use of the mark "likely to be taken as a reference to the plaintiffs or their "goods?" When that question has been put and answered, the question still remains whether the defendants are protected by sub-s. 3. To me, having read and re-read the sub-section, the answer still seems plain. I can find nothing in it which allows, much less compels, me to say that the user of the mark "Bisurated" by the defendants is in relation to anything but the plaintiffs' goods. It is quite true that the mark is used and that it is used in relation to goods in respect of which the mark is registered, that is, it is an advertising circular issued to the public, and that it imports a reference to the plaintiffs. But all those conditions may be fulfilled and yet, if the user is in relation to the plaintiffs' own goods, as here, in my judgment, the user clearly is, there is no infringement, for the user is protected by sub-s. 3. If this is the construction to which I must otherwise come, I do not think that I must allow myself to be driven from it by the difficulty of finding a case which is covered by (*b*) and not by (*a*). It may well be that there are such cases, though they do not occur to me.

If the plaintiffs' contention is right, a chemist will be liable to an action for infringement if in one part of his shop window he exhibits the plaintiffs' Bisurated Magnesia, and in another the defendants' Bismuthated Magnesia, with a statement on each of their contents and their price. Nor would any stores venture to catalogue under the same and appropriate heading rival preparations for the cure of some common ill lest the owner of either preparation should say that the name of his preparation was in whole or part protected by a trade mark and that the trade mark was infringed by the mention of the other preparation in its immediate neighbourhood.

No test is available by which it can be determined whether, in such a case, there is in relation to any other than the plaintiffs' own goods a user which imports a reference to the plaintiffs or their goods. I must decline, unless I am forced by clear words to do so, to adopt a construction which would leave the trading community at the risk of the assertion of an indeterminate and hitherto unknown right.

I come to the conclusion that the plaintiffs' case on infringement fails and must be dismissed with costs.

The other part of the case can be dealt with very shortly. It is a fact admitted by the defendants that they have sold under the description "Bismag" a medicinal preparation which is not of the plaintiffs' manufacture. It was established to my satisfaction that such user of the word "Bismag" is calculated to lead the public into the belief that the defendants' goods thus sold are the plaintiffs' goods. There is, therefore, a clear case for relief. I accept the defendants' evidence that they used the word "Bismag" in ignorance of the existence of the plaintiff company and of the possibility of deception. In fact they themselves called the attention of the plaintiffs to the user of which complaint is made, being under the impression, when they received the writ in this action, that it related to that user, and at once offered to make the necessary amends. They did not, however, by their defence adhere to this line. Accordingly, I must deal with this part of the case strictly. I will accept the defendants' undertaking in the terms of para. 2 of the claim. There will be the usual order for delivery up of labels, etc., which contain the offending word "Bismag." On the footing that the plaintiffs have succeeded in this part of their case, I will order them to pay three-quarters only of the defendants' costs of the action.

Solicitors: *McKenna & Co.*; *Edward Davis, Nelson & Co.*

**H. L. L.**

# *In re* COURTS (EMERGENCY POWERS) ACT, 1939.

MORTON
J.

1940
Jan. 24.

# *In re* ABBEY ROAD BUILDING SOCIETY (POMEROY'S TRUSTEE).

[1939. A. 2717.]

*Mortgage—Mortgagor—Outbreak of war—Bankruptcy—Disappearance of bankrupt while undischarged—Mortgagee's application for receiver—Trustee in bankruptcy proper respondent—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2, *para.* (*a*)*; sub-s.* 4.

By s. 1, sub-s. 2, para. (*a*), of the Courts (Emergency Powers) Act, 1939: " Subject to the provisions of this section, a person " shall not be entitled, except with the leave of the appropriate " court,—(*a*) to proceed to exercise any remedy which is available " to him by way of— . . . . (ii.) the . . . . appointment of a " receiver of any property; . . . ."

By sub-s. 4: " If, on any application for such leave as is required " under this section for the exercise of any of the rights and " remedies mentioned in subsections (1.), (2.) and (3.) of this section, " the appropriate court is of the opinion that the person liable to " satisfy the judgment or order, or to pay the rent or other debt, " or to perform the obligation, in question is unable immediately " to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court " may refuse leave for the exercise of that right or remedy, or give " leave therefor subject to such restrictions and conditions as the " court thinks proper."

A mortgagee applied by procedure summons for liberty, despite s. 1, sub-s. 2, para. (*a*), to appoint a receiver of the mortgaged property and to exercise mortgagee's rights under a legal charge made between the mortgagee and the mortgagor. The mortgagor was not, within sub-s. 4, " liable to satisfy the judgment or order, " or to pay the rent or other debt, or to perform the obligation, " in question," as he had been adjudicated a bankrupt after the outbreak of war. He had not been discharged and had disappeared, so that the summons could not be served on him. The summons was addressed to his trustee in bankruptcy, who did not oppose the application:—

*Held*, (1.) that the intention of the section is that the respondent to such an application should be the person in whom is vested the equity of redemption in the mortgaged property, in this case the trustee in bankruptcy;

(2.) That the application, as the trustee in bankruptcy did not oppose it, ought to be granted.

MORTON J.

1940

COURTS (EMERGENCY POWERS) ACT, 1939, *In re.*

ABBEY ROAD BUILDING SOCIETY (POMEROY'S TRUSTEE), *In re.*

PROCEDURE SUMMONS.

On this application the Abbey Road Building Society (hereinafter called "the building society") asked that, notwithstanding the provisions of s. 1, sub-s. 2, para. (*a*), of the Courts (Emergency Powers) Act, 1939, it should be at liberty to appoint a receiver of property known as 9, Tulse Hill, London, and to exercise any right which it might have as mortgagee under a legal charge dated February 9, 1937, and made between the building society and David Pomeroy (hereinafter called "the bankrupt"). The bankrupt had been adjudicated after the outbreak of war, had not been discharged, and had disappeared.

The building society, pursuant to s. 1, sub-s. 2, para. (*a*), took out the summons, which was addressed to the trustee in the bankruptcy. The trustee in the bankruptcy attended before the Master and did not object to leave being given; but the Master took the view that he could not give leave because the proper person to be made respondent to the summons was not the trustee in the bankruptcy, but the bankrupt. At the hearing of the summons in Court the trustee in the bankruptcy did not appear, but a letter written on his behalf to the solicitors for the building society stated that he was of opinion that it was in the best interests of everyone that the building society's application should be granted.

*R. J. Sutcliffe* for the building society. The question arises whether the bankrupt or his trustee in bankruptcy is the proper respondent to the summons. It is arguable that the bankrupt is, as the trustee cannot show that he himself is, within s. 1, sub-s. 4, " . . . . unable immediately" to pay the debt "by reason of circumstances directly or indirectly "attributable" to the war. On the other hand, the bankrupt does not now come within that sub-section as " . . . . the "person liable to . . . . pay the rent or other debt, . . . ." So far as he is concerned the debt is gone, because he has been adjudicated bankrupt, and the building society is asking no remedy against him. The person liable is the person in whom the equity of redemption in the property is vested, namely, the trustee. True, he is not personally liable for the debt; but the building society, since it comes within s. 1, sub-s. 2, of the Act, must come to the Court for leave to proceed; it must have a respondent to the summons, and the proper respondent is the trustee.

There is little authority on this point: but the property is registered property at Tulse Hill within the registration area; and s. 42, sub-s. 1, of the Land Registration Act, 1925, specifically provides that: "Upon the bankruptcy of the "proprietor of any registered land or charge his trustee shall "(on production of the prescribed evidence to be furnished "by the official receiver or trustee in bankruptcy that the "land or charge is part of the property of the bankrupt divisible "amongst his creditors) be entitled to be registered as proprietor "in his place. . . . ." In fact, all property, whether registered or not, vests, in such a case, in the trustee in bankruptcy, who is the only person with any right to complain if the mortgagee takes any step which he must not take without the leave of the Court. [He referred to s. 28 of the Bankruptcy Act, 1914, which deals with the effect of an order of discharge.] Here the bankrupt is not discharged, but he is not liable at the moment to pay the debt.

[MORTON J. Nor is the trustee in bankruptcy liable to pay it. This case is at the moment a casus omissus.]

If the trustee does not pay the debt with which the property is charged, the property will be taken from him. [He referred to *Anchor Trust Co.* v. *Bell.* (1)]

The matter is one of great importance, because the bankrupt has disappeared without having filed a statement of affairs. There are many cases in which bankrupt mortgagors to building societies disappear, with the result that it is impossible to serve them.

MORTON J. [after stating the facts and reading s. 1, sub-s. 4:] It seems apparent from that sub-section that the person to be made respondent to the application for leave under the Act is the person described in the words "the person liable to

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(1) [1926] Ch. 805.

"satisfy the judgment or order, or to pay the rent or other "debt, or to perform the obligation in question." The position in the present case is a curious one, and it is a little difficult to see how either the bankrupt, having regard to the bankruptcy and the effect of bankruptcy, or the trustee in bankruptcy, exactly answers this description. I think, however, that the intention of the section is that, on an application by a mortgagee, such as the present application, the person to be made the respondent to the application should be the person in whom the equity of redemption in the property is vested. It is quite clear under the provisions of the Bankruptcy Act, 1914, that the person in whom the equity of redemption in the property is vested is the trustee in bankruptcy. He is, I think, the person who is really interested in making up his mind whether or not he should oppose the application, and I cannot think that the Legislature intended that the bankrupt, who had ceased to be the owner of the equity of redemption, should be made a party to an application such as this. Although this construction of the Act is not free from difficulty, as the wording of the sub-section does not appear to fit very aptly a case in which a mortgagor has become bankrupt, I have arrived at the conclusion that I ought, on a fair reading of the Act, to give the sub-section this construction. Accordingly the trustee in bankruptcy having been, in my view, properly made a respondent to this summons, having raised no objection before the learned Master and not having appeared before me to oppose the application, I think that I ought to grant this application.

Solicitors: *Messrs. T. F. Peacock, Fisher, Chavasse and O'Meara.*

K. R. A. H.

MORTON
J.

1940
Feb. 9.

## *In re* RANTZEN'S SETTLEMENT.

## *In re* RANTZEN'S DEED OF APPOINTMENT.

## RANTZEN *v.* RANTZEN AND INGRAM.

[1939. R. 2097.]

*Power of appointment—Power to settlor in settlement—" After any " marriage "—For benefit of settlor and wife and children or remoter issue—Marriage after date of settlement—Death of wife and only child of marriage—Settlor still able to appoint in terms of power.*

A settlement gave a settlor power at any time, in contemplation of or after any marriage of his, by deed to appoint all or part of the settled funds for the benefit of himself and any wife of his and his children or remoter issue. He married after the date of the settlement, and his wife and the only child of the marriage died without his having exercised the power:—

*Held*, that, on the true construction of the proviso containing the power, the words " after any marriage " were not limited to the period during which the marriage subsisted, and that the settlor could appoint in the terms of the power at any time after he had been married.

ADJOURNED SUMMONS.

A settlement dated November 25, 1910, and made between Woolfie Barnato Rantzen (hereinafter called " the settlor ") of the one part and two trustees of the other part provided that the trustees should have power to retain the settled funds (hereinafter called " the trust funds ") or, at the settlor's request, to sell or convert and re-invest them as therein provided, and to pay the income to the settlor until some act or event should occur whereby, if it belonged to him absolutely, it would become vested in or charged in favour of someone else, and thereupon from time to time during his life at their absolute and uncontrolled discretion to pay or apply it for the maintenance or personal support and benefit of all or any of the following: the settlor and his wife (if any) and his children or remoter issue in such proportion or manner as the trustees or trustee should in their or her discretion think proper. After the settlor's death the trustees were to stand possessed of the capital and future income of the trust funds in trust for such person or persons for such purposes and in such manner as the settlor should by will or codicil appoint, and in default of and subject to such appointment in trust for those who, at his death, if he had died intestate, would have become entitled to his personal estate.

The settlement continued: " Provided Always that . . . . "it shall be lawful for the settlor at any time or times and "either in contemplation of or after any marriage of the "settlor by any deed or deeds to appoint that either the "whole of the said trust funds or any part thereof shall "thenceforth be withdrawn wholly or partially from the "operation of this present settlement and be held upon such "trusts and with such powers as shall be declared by such "settlement for the benefit of the settlor and any wife of "his and his children or remoter issue . . . . but so never-"theless that the settlor and any wife of his shall not take "any interest exceeding a life interest and that no child or "remoter issue of the settlor shall take an interest vesting "earlier than his or her age of twenty-one years or marriage " . . . . "

On March 21, 1934, the settlor married. On October 5, 1934, the only child of the marriage was born. On September 6, 1937, the child died, and on September 10, 1937, the wife died.

By a deed of appointment, dated November 3, 1939, the settlor irrevocably appointed that the trust funds, or the investments for the time being representing them, should immediately after the date thereof be held by the trustees of the settlement on trust to pay the income thereof to the settlor during his life.

By summons dated November 8, 1939, he asked whether the deed was a valid exercise of his power of appointment. Leave was given during the hearing to amend, asking instead whether, under the proviso and in the events which had happened, the settlor still had power to appoint.

*Alexander Grant K.C.* and *George Russo* for the settlor.

The settlor could have done anything "for the benefit of any "wife of his and his children or remoter issue" had both wife and child been alive. It would have been a perfectly good appointment, because it would have been "after any "marriage." Had the wife alone died, he could still have appointed for the benefit of his children or remoter issue. It follows, therefore, that the power to appoint has not been taken away from him by the child's death.

*G. D. Johnston* for Miss Katie Rantzen and Miss Edith Lilian Ingram, the trustees. The trustees submit to act as the Court shall direct. The curious thing about the case is that no question has arisen on it, because the income of the trust funds is payable to the settlor under the settlement, whether on protective trusts or as tenant for life.

The substance of the case is whether the power can be exercised in the circumstances of the marriage having come to an end and there being no surviving spouse or issue, so that the only person who can take under the power is the settlor himself. "After" might mean any date after the marriage. On the other hand, these are words that have been used by generations of conveyancers.

[He referred to s. 158 of the Law of Property Act, 1925 (which deals with validation of appointments where objects are excluded or take illusory shares), and to *In re Deakin. Starkey* v. *Eynes.* (1)]

This is not a power to the settlor to appoint to himself, and to any wife and his children or remoter issue. It is a power to distribute among them, and is a special power: *Vatcher* v. *Paull.* (2)

MORTON J. [after stating the facts:] The question asked by the summons is whether, on the true construction of the settlement and in the events which have happened, the deed of appointment was a valid exercise of the power of appointment conferred on the plaintiff by the settlement. Mr. Grant for the plaintiff does not now, however, ask me to answer that question. He does not desire to raise any question at

(1) [1894] 3 Ch. 565, 576.

(2) [1915] A. C. 372, 378.

all as to the validity of the deed of appointment or as to its effect (if any) upon the present situation. He asks me to decide only a question as to the construction of the settlement.

The question which I am now asked to decide is whether, on the true construction of the proviso, and in the events which have happened, of the settlor having married and had a child but being now a childless widower, the proviso authorizes the settlor to appoint that the whole or any part of the trust fund shall be held on trust for the settlor during his life, then on trust for any wife who may survive him during her life, and then, as to the capital, on trusts for the benefit of the settlor's children or remoter issue. I have given leave for the summons to be amended so as to raise this question.

The position is that the settlor married on March 21, 1934, that there was one child of the marriage and that both wife and child are now dead. In those circumstances the first question is whether it can be said that the settlor, if he executes an appointment of the nature that I have indicated, exercises the power of appointment " after any marriage," within the meaning of that phrase in the proviso. I cannot limit those words to the period during which the marriage is subsisting. In my opinion the settlor is entitled to execute an appointment under the proviso at any time after he has been married. That being so, I am of opinion that the period during which he can execute it includes the present moment.

Then arises the question, can the settlor make an appointment of the nature that I have indicated ? It is suggested that, because he has at present no wife and no child, he cannot. On the wording of the proviso it seems to me that he is expressly allowed to appoint to himself, to any wife of his, and to his children. That being so, I cannot see why the proviso does not authorize the settlor to exercise the power of appointment in the manner which I have indicated. I desire to make it quite clear that I am expressing no view as to how far (if at all) the settlor's present powers of appointment are affected by his having executed the deed of appointment of November 3, 1939.

The costs of all parties will be taxed as between solicitor and client, and paid out of the capital of the trust fund.

Solicitors: *Reid Sharman & Co.; H. B. J. Paull.*

K. R. A. H.

FARWELL J.

1940
Jan. 12.

## GASSON AND HALLAGAN, LIMITED *v.* JELL.

[1939. G. 2424.]

*Mortgage—Mortgagee's claim for account and payment—No claim for foreclosure or sale—Motion for appointment of receiver—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*b*). (1)

The mortgagor of a piece of freehold land having failed to make certain payments, the mortgagees, whose power of sale had thereby arisen, issued an originating summons on November 29, 1939, claiming an account of what was due under the mortgage, payment of the amount found due and a receiver. They subsequently applied by motion for the appointment of a receiver:—

*Held*, that, since they were only claiming personal relief against the mortgagor and were not seeking to enforce their security, the Court should not appoint a receiver and thereby enable them to evade the provisions of the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*b*), under which leave to institute proceedings for foreclosure or sale had to be obtained.

MOTION.

By a legal charge dated April 28, 1939, and made between Gilbert Cyril Jell (hereinafter called "the mortgagor") of the one part and Gasson and Hallagan, Ld. (hereinafter called "the mortgagees") of the other part, the mortgagor covenanted with the mortgagees for repayment to them on July 5, 1939, of the aggregate principal sum of 4630*l.* 6*s.* 5*d.*, with interest thereon at the rate of 6½ per cent. per annum, and he covenanted, if the sum were not paid on that day, to pay interest at the rate mentioned by equal quarterly payments. He charged by way of legal mortgage certain freehold property at Barham, in Kent, and he further assigned to the mortgagees certain policies of assurance on his life. It was provided that the power of sale of the mortgagees should be exercisable by them at any time after the happening of certain events, that was to say (inter alia) if any interest should not be paid within twenty-one days after the date for payment. The mortgagor failed to pay the interest, amounting to 71*l.* 16*s.* 4*d.*, payable on October 5, 1939.

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(1) By the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: "Subject to the provisions of this "section, a person shall not be "entitled, except with the leave "of the appropriate court— . . . . "(*b*) to institute any proceedings "for foreclosure or for sale in "lieu of foreclosure, or take any "step in any such proceedings "instituted before the commence-"ment of this Act . . . ."

On November 29, 1939, the mortgagees took out an originating summons, to which the mortgagor was the defendant, asking: "1. That an account may be taken of what is due "to the plaintiffs under or by virtue of the said legal charge "and for their costs of this action. 2. That the defendant "may be ordered to pay to the plaintiffs the moneys which "shall be found due to the plaintiffs on taking such account. "3. That a receiver of the property comprised in and charged "by the said legal charge may be appointed by this honourable Court. 4. That such further and other relief may be "granted as to this honourable Court shall seem meet." On November 30, 1939, the mortgagees gave notice of motion for the appointment of a receiver of the property comprised in the legal charge.

*R. Cozen-Hardy Horne* for the mortgagees. It is always open to a mortgagee to claim the appointment of a receiver which is not necessarily a step in an action for foreclosure or sale. The Court always has jurisdiction to make the appointment. Accordingly, the mortgagees in the present case are entitled to seek this relief, though they do not claim foreclosure or sale: *Taylor* v. *Emerson* (1); *Burrowes* v. *Molloy* (2); *Lord Crewe* v. *Edleston* (3); Halsbury's Laws of England, 2nd ed., vol. xxiii., p. 444, para. 654.

*J. F. Bowyer* for the mortgagor. The claim made in this case is an attempt to evade the provisions of s. 1, sub-s. 2 (*b*), of the Courts (Emergency Powers) Act, 1939, whereby the leave of the Court must be obtained before instituting proceedings for foreclosure or sale. The Court should not permit this since the appointment of a receiver is a step in the realization of the security, while here only a personal claim is made against the mortgagor. Accordingly, the question of the protection of the security does not arise.

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(1) (1843) 4 Dr. & War. 117; 6 Ir. Eq. R. 224.
(2) (1845) 2 Jo. & Lat. 521; 8 Ir. Eq. R. 482.
(3) (1857) 1 De G. & J. 93.

FARWELL J. This is a motion by the plaintiffs for the appointment of a receiver of certain property which is mortgaged to them by the defendant. The form of originating summons is one which, until very recent events, was, I venture to think, unknown in an action of this sort, because the plaintiffs do not seek to enforce their security by foreclosure or sale, or in any other way. All they ask is that an account should be taken and that the defendant should be ordered to pay the amount found to be due. Except for the claim for the appointment of a receiver, there is no other relief sought. Therefore, the plaintiffs are seeking in the action to enforce their personal remedy against the defendant by way of an account and payment by him. They are not seeking to obtain the enforcement of their security.

In those circumstances they have moved this Court for the appointment of a receiver of the property comprised in the legal charge. The objection has been taken by the defendant that a motion such as this should not be acceded to, having regard to the fact that the claim in the action itself has no relation at all to the mortgaged property but is merely for personal relief against the defendant by way of account and an order to pay. It is said that, in those circumstances, the relief ought not to be given by the appointment of a receiver.

The reason why the plaintiffs have issued their summons in this form is quite obvious. It is for the purpose of avoiding the provisions of s. 1, sub-s. 2 (*b*), of the Courts (Emergency Powers) Act, 1939. If a plaintiff desires to seek the ordinary remedy which a mortgagee claims in an action of this sort, namely, foreclosure or sale, he is faced with the necessity of obtaining the leave of the Court under the Act to institute any such proceedings, the defendant being given the opportunity of satisfying the Court that his inability to pay is due directly or indirectly to the war. This is a device—I am not using that word in an offensive sense at all—to avoid the necessity of making such an application under the Act, while asking the Court to appoint a receiver, a step which, in an ordinary foreclosure action, may be necessary for the protection of the security.

It appears to me that, in those circumstances, it would be wrong for this Court to exercise the discretion, which undoubtedly it has in cases of this kind, by appointing a receiver. The plaintiffs in their summons make no claim against the mortgaged property at all. This is not a case where, on the face of it, there is any ground for suggesting that it is necessary to preserve the mortgaged property, because the plaintiffs are not seeking to get their remedy from it; they are seeking merely a personal remedy. In my judgment, any attempt to use an action of this sort for the purpose of evading the imposition by the Legislature of the requirements protecting persons who have been injuriously affected by the war, is a thing which this Court ought not readily to countenance. No doubt, if an action for foreclosure has been commenced, leave having been obtained for that purpose, and then there is a motion for the appointment of a receiver, the Court can properly appoint one without any further application under the Act, although, in my view, in considering whether a receiver ought to be appointed, the Court must, if the occasion arises, see how far the difficulty of the defendant is due to circumstances arising from the war. But that arises, not under the Courts (Emergency Powers) Act, 1939, but in the exercise of the ordinary discretion of the Court in seeing whether justice requires that a receiver should be appointed. In a case such as the present, if there had been a claim for foreclosure or sale, the Court might well have thought that justice required the appointment of a receiver for the purpose of preserving the mortgaged property and, in that way, enabling the plaintiffs to get the benefit of their security on it. But in a case such as this, where there is no claim of that kind, and all that is asked is an account and payment, in my judgment, it would not be right for this Court to appoint a receiver, since as between

FARWELL J.

1940

GASSON AND HALLAGAN, LD. v. JELL.

mortgagor and mortgagee, where foreclosure or sale is claimed, leave to issue the writ is necessary under the Act. I do not think that this Court ought to countenance a device which would enable a plaintiff to get the advantage which he might obtain by the appointment of a receiver, where he makes no claim against the property itself but merely makes a personal claim against the defendant, which does not require leave under the Act.

In my judgment, this is not a case in which the Court ought to exercise its discretion by appointing a receiver, and, in those circumstances, I must dismiss the application.

On an application for leave to amend the pleadings by adding a claim for foreclosure or sale, his Lordship said that a summons should be taken out for that purpose under the Act.

Solicitors: *Kingsford, Dorman & Co., for Henry G. Baily & Strickland, St. Leonards*; *Langford, Borrowdale & Thain.*

F. C.

FARWELL
J.

1940
Jan. 15.

## *In re* ZAKON.

## *Ex parte* THE TRUSTEE *v.* BUSHELL.

[No. 959 of 1938.]

*Bankruptcy—Deed of assignment—Majority of creditors not in favour of deed—Trustee under deed acting for some weeks—Debtor subsequently adjudicated bankrupt—Rights of trustee under deed—Deeds of Arrangement Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 47), *ss.* 2, 3, 21. (1)

The creditors of a debtor refused to assent to a deed of assignment whereby he had assigned his property for their benefit to a trustee who had registered it under the Deeds of Assignment Act, 1914. Nevertheless, acting thereunder, the trustee carried on the debtor's business for some weeks, collected debts to the amount of 1067*l.* 13*s.* 10*d.* and paid the debtor an allowance of 10*l.* After the debtor had been adjudicated bankrupt on a creditors' petition, the trustee of the deed in paying to the trustee in bankruptcy the moneys collected by him claimed to be entitled to retain the costs of registering the deed, the amount of the allowance paid to the debtor and a sum of 106*l.* 11*s.* as reasonable recompense to himself and his assistants :—

*Held,* (1.) that though s. 2 of the Act did not make it necessary for the debtor or a creditor to register the deed, it never became effective since a majority of the creditors had not assented to it under s. 3 and that, accordingly, as it was not " avoided by " reason of the bankruptcy of the debtor," s. 21 had no application to this case ;

(2.) that nothing in the Act permitted the trustee in bankruptcy to make such an allowance as was claimed which must be made, if at all, by the Court ;

(3.) that the trustee of the deed had acted at his own risk, and before the Court could make such an allowance it must be satisfied that his exertions had resulted in a real benefit to the creditors ;

(4.) that in the circumstances of this case the allowance should not be made.

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(1) By the Deeds of Arrangement Act, 1914, s. 2 : "A deed of "arrangement shall be void unless "it is registered with the registrar "of bills of sale under this Act "within seven clear days after the "first execution thereof by the "debtor or any creditor. . . . ."

By s. 3 : " A deed of arrange- "ment, which either is expressed "to be or is in fact for the benefit "of a debtor's creditors generally "shall be void unless, before or "within twenty-one days after "the registration thereof . . . . "it has received the assent of a "majority in number and value "of the creditors of the debtor."

By s. 21 : " Where a deed of "arrangement is avoided by reason "of the bankruptcy of the debtor, "any expenses properly incurred "by the trustee under the deed in "the performance of any of the "duties imposed on him by this "Act shall be allowed or paid him "by the trustee in the bankruptcy "as a first charge on the estate."

MOTION IN BANKRUPTCY.

On November 12, 1938, Marks Zakon (hereinafter called "the bankrupt"), a millinery manufacturer, executed a deed of assignment of his property to Frederick Reginald Bushell (hereinafter called "the respondent"), as trustee, for the benefit of his creditors. On November 17, 1938, the respondent procured the deed to be registered. On November 18, 1938, a meeting of the creditors of the bankrupt was held. The creditors then present by a considerable majority dissented from the deed. On November 24, 1938, a creditors' petition in bankruptcy was presented against the bankrupt. On January 5, 1939, a receiving order was made. On January 25, 1939, Horace Johnston Veitch (hereinafter called "the "applicant") was appointed trustee of the property of the bankrupt, who, on February 1, 1939, was adjudicated bankrupt.

From November 18, 1938, to January 28, 1939, the respondent acted under the deed of assignment. He got in book debts amounting to 1067*l.* 13*s.* 10*d.*, and carried on the business to a small extent, making up some of the material in the possession of the bankrupt and selling it. When the question of payment to the applicant of the sums collected from the bankrupt's debtors arose, the applicant was willing to allow the respondent credit for the following sums: 90*l.* 12*s.* 9*d.* paid in respect of distrainable rent; 7*l.* 17*s.* 5*d.* for petty disbursements; 202*l.* 7*s.* 7½*d.* for trading payments. But the respondent also claimed to be entitled to retain 121*l.* 5*s.* 10*d.*, a sum which was made up as follows: 4*l.* 14*s.* 10*d.*, the costs of registration of the deed; 10*l.*, an allowance paid to the bankrupt; 80*l.* and 26*l.* 11*s.* claimed as reasonable recompense for himself and his clerks and assistants in carrying on the business and collecting the book debts.

By this motion the applicant sought an order that the respondent should pay him 121*l.* 5*s.* 10*d.*

*Leonard Lewis* for the applicant. This deed was never effective. It was not registered "by the debtor or any "creditor" as required by s. 2 of the Deeds of Arrangement Act, 1914, nor did it receive the assent of a majority of the creditors under s. 3. Accordingly, the deed was not "avoided "by reason of the bankruptcy of the debtor" within s. 21, and the trustee under it is not entitled to be paid by the trustee in bankruptcy expenses incurred by him. Alternatively, if he is entitled to be allowed his expenses under s. 21 those are strictly limited to expenses incurred in respect of duties imposed on him by the Act: *In re Geen. Ex parte Parker.* (1) He is not entitled to remuneration in respect of other acts properly performed by him under the deed alone. It is, however, submitted that the effect of the Act was that the deed was void when it was executed and remained void unless at a later stage certain things were done in relation to it. In this case they were not done. The nearest analogy is to an escrow.

Further, in any event these payments should not be allowed by the trustee in bankruptcy in the circumstances of this case. He should be very slow to adopt services so rendered: *In re Simonson. Ex parte Ball.* (2) No benefit accrued to the creditors as the result of the activities of the trustee of the deed which would not have accrued in any case. He knew almost from the first that the deed would not be operative and acted at his own risk.

*Alan Orr* (for *John Buckley* on war service) for the respondent. The trustee of the deed has conferred a benefit on the general body of creditors and the Court has jurisdiction to order him to be allowed a reasonable recompense: *In re Foster. Ex parte The Official Receiver.* (3) That case turned on the general equity that if the benefit of the trustee's exertions had been taken they should be paid for. In this case it would be inequitable for the creditors to refuse remuneration to the trustee of the deed. He has increased the assets by carrying on the business. By collecting the debts and paying the amount collected to the trustee in bankruptcy he has prevented it from falling into the hands of the debtor. Further, the deed was not void from the beginning, as s. 2 properly read did not make it necessary for the debtor or any creditor to register it. Registration by the trustee was sufficient.

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(1) [1917] 1 K. B. 183.
(2) [1894] 1 Q. B. 433, 437.
(3) (1895) 72 L. T. 364.

*Leonard Lewis* in reply. The trustee of the deed has no equity on which he can rely. He thrust himself forward in circumstances in which it was not necessary and when a reasonably prudent man would not have done so. He acted entirely at his peril.

FARWELL J. [having stated the facts :] The question has been argued before me as a matter of construction of the Deeds of Arrangement Act, 1914. It is only necessary to refer to three sections of that Act. By s. 2 : " A deed of "arrangement shall be void unless it is registered with the "registrar of bills of sale under this Act within seven clear "days after the first execution thereof by the debtor or any "creditor, or if it is executed in any place out of England, "then within seven clear days after the time at which it "would, in the ordinary course of post, arrive in England." In passing, I may say that, in my view, the words " by the "debtor or any creditor," refer to the execution of the deed and not the registration of it. There is nothing, so far as I can see, in that section which makes it necessary for the debtor or any creditor to register the deed. If it is not registered in accordance with the Act and within the time limited thereby it becomes ineffective, so that it is for the benefit of those interested to see that it is so registered, but I cannot read s. 2, as it is suggested I should read it, as though the registration had to be done by the debtor or a creditor. In my opinion that is not the true construction of that section.

By s. 3 : " A deed of arrangement, which either is expressed "to be or is in fact for the benefit of a debtor's creditors "generally "—that is this case—" shall be void unless, before "or within twenty-one days after the registration thereof, or "within such extended time as the High Court or the court "having jurisdiction in bankruptcy in the district in which "the debtor resided or carried on business at the date of the "execution of the deed may allow, it has received the assent "of a majority in number and value of the creditors of the "debtor." In the present case at the expiration of the period of twenty-one days the necessary majority of creditors had not assented, and accordingly for that reason the deed was never effective at all. It is not a case where after such a majority had assented, there was a bankruptcy which avoided the deed.

The only other section to which I need refer is s. 21, which really has little or nothing to do with what I have to consider. It provides that: "Where a deed of arrangement is avoided "by reason of the bankruptcy of the debtor, any expenses "properly incurred by the trustee under the deed in the "performance of any of the duties imposed on him by this "Act shall be allowed or paid him by the trustee in the "bankruptcy as a first charge on the estate." It was held in the case of *In re Geen. Ex parte Parker* (1) that such expenses as those are strictly limited to expenses incurred in the performance of the duties specifically imposed on the trustee by the Act. In my judgment, s. 21, having regard to the facts in this case, has no application at all. There is nothing, so far as I can see, in the Act itself which authorizes the payment of expenses where the deed has never become effective because of the failure to obtain the assent of the majority of the creditors. The way in which counsel for the respondent put his case was this. He said that in so far as the general body of creditors have benefited by the acts done by the trustee under the non-effective deed, they have taken some benefit which they could only have got by virtue of his exertions. In such a case as that it is said that it would be inequitable to permit them to take the benefit which they have acquired in that way and at the same time to refuse the person who has obtained it any costs or expenses which he may have incurred.

It is contended that where the trustee of a deed of arrangement has put himself to expense and as a result of his own exertions has benefited the creditors, then the equity of the matter requires that he should have some compensation for what he has done. It is not suggested, as I follow the argument, that there is anything in the Act which, in terms, permits such payments to be made; but it is said that the Court has a general jurisdiction to see that such a person who has by his labours or expenditure of money acquired a benefit which has passed to the general body of creditors, has some recompense for the expense or trouble to which he has been put.

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(1) [1917] 1 K. B. 183.

I may say at once that there is nothing in the Act which would entitle the trustee in bankruptcy to permit any such allowance to be made. If any such allowance should be made, it must be by the Court. In my judgment the trustee in bankruptcy in this case was amply justified in saying that he could not allow these deductions to be made and in coming to the Court, as he has done, for its assistance in the matter.

It does not, however, necessarily follow that there may not be jurisdiction in the Court itself in a proper case to allow something to a person in the position of this respondent by way of compensation or otherwise for work done or expense to which he has been put, but in my judgment the Court will only so act under exceptional circumstances. In the present case the respondent took upon himself the business of seeing that the deed was registered, of collecting the debts and of carrying on the business to a limited extent. He even went to the length of permitting a small payment to be made to the bankrupt himself as an allowance. During the whole of that time he had no means of knowing whether the deed would ever become effective. If the necessary assents had been obtained, he might then have said that all he had done had been for the benefit of the creditors who assented to the deed, and that the fact that he came in before he was safeguarded by the provisions of the Act ought not to be held against him, because if a person elected to act in the way in which this gentleman did, it might well be only with the intention of assisting the general body of creditors. If, however, he chooses to act in the way he has done, and expends time, labour or money in so doing, he does so entirely at his own risk without any right to recover anything. In

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my judgment there may be cases in which so obvious a benefit has resulted from the acts which the person in that position has done that it would be manifestly unfair to permit the creditors to receive that benefit without making some return to the person who had earned it for them; but before the Court can permit that to be done it has to be amply satisfied that the exertions in respect of which the claim is made have resulted in a real benefit to the creditors.

In the present case it is said that by collecting the debts the respondent prevented the money getting into the hands of the bankrupt and thereby enabled it to be paid over to the trustee in bankruptcy. It is also said that by carrying on the business as he did for a time he secured some benefit to the creditors. With regard to those matters it may be that the general body of creditors have to some extent benefited, but I am not satisfied that it is so. I have no evidence before me that the bankrupt would have collected these debts and diverted them from the trustee in bankruptcy, nor that any real benefit has resulted to the general body of creditors through the actions of the respondent. I feel some little sympathy with the respondent because it is hard on anyone who has expended money for somebody else to have to bear the cost out of his own pocket; but the respondent should not have come in and done what he did do in the circumstances of this case until he was satisfied that the deed under which he purported to act had been or would be affirmed by the general body of creditors. Generally speaking, if a person in his position chooses to come in and to expend money in the matter, he is doing it entirely at his own risk.

In my judgment the respondent has only himself to thank for the position in which he now finds himself. The proper order to make on this motion is that he be ordered to pay over the money in question, and that he must pay the costs of this motion.

Solicitors: *Zeffertt, Heard & Morley Lawson; McKenna & Co.*

F. C.

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1940

Jan. 19.

## *In re* HODGE. HODGE *v.* GRIFFITHS.

[1939. H. 1330.]

*Administration—Gift on condition—Freehold house—Beneficiary sole executor—Whether gift accepted—Whether written assent necessary—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 36, *sub-s.* 4. (1)

A testatrix who died in 1934 devised to her husband, who was executor and sole residuary legatee under her will certain freehold buildings in consideration of his paying her sister 2*l.* a week for life, directing that in the event of his disposing of them he should in lieu thereof invest 2000*l.* for her benefit and that of her children. The husband proved the will and, till the buildings were sold in 1939, paid the surplus rents to the sister, making up the amounts to 2*l.* a week out of his own pocket. After the sale the question arose whether he was under an obligation to provide the sum of 2000*l.* :—

*Held*, (1.) that the will created a personal obligation which was binding on him if he accepted the devise;

(2.) that the property could vest in him as devisee, though he had not under the Administration of Estates Act, 1925, s. 36, sub-s. 4, signed as legal personal representative, an assent to the legal estate so vesting, since the legal estate vested in him as legal personal representative and his equitable estate as devisee depended on whether or not he had done acts which made it impossible for him to deny that he had accepted the devise;

(3.) that in the circumstances he had accepted the devise and undertaken the burden laid on him as devisee.

ADJOURNED SUMMONS.

Kate Marion Hodge (hereinafter called "the testatrix") made her will on July 21, 1933, and died on July 15, 1934. She thereby appointed her husband, Alfred Henry Hodge (hereinafter called "the plaintiff"), and Thomas Thornton Griffiths, executors and trustees thereof. On October 15, 1934, the will was proved by the plaintiff alone.

The will provided (inter alia): "I give, devise and bequeath "my freehold land and buildings, known as Nos. 11 and

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(1) By the Administration of Estates Act, 1925, s. 36, sub-s. 4: "An assent to the vesting of a "legal estate shall be in writing, "signed by the personal repre- "sentative, and shall name the "person in whose favour it is "given and shall operate to "vest in that person the legal "estate to which it relates; and "an assent not in writing . . . . "shall not be effectual to pass a "legal estate."

"11A, Turle Road, Finsbury Park, to my husband, Alfred "Henry Hodge, in consideration of him paying to my sister "Constance May Griffiths the sum of 2*l.* per week during her "life and I further direct that in the event of my said husband "disposing of the whole of the property the annuity of 2*l.* "per week shall cease and in lieu thereof he shall invest the "sum of 2000*l.* in authorized trustee securities in the name of "Constance May Griffiths, Alfred Henry Hodge and Thomas "Thornton Griffiths, and shall pay the income from such "investment to my sister the said Constance May Griffiths "during her life and after her death the said Alfred Henry "Hodge and Thomas Thornton Griffiths shall stand possessed "of the investments representing the said trust to divide the "same equally between the children of the said Constance "May Griffiths . . . . and as to all the rest, residue and "remainder of my estate both real and personal of whatsoever "nature or kind and wheresoever situated in possession, "reversion or remainder, I give devise and bequeath the same "unto my husband Alfred Henry Hodge, for his own sole use "and personal benefit absolutely."

At the time of her death the testatrix and the plaintiff had a joint account at the Midland Bank, Ld., on which they owed a sum of 6775*l.* 9*s.* 6*d.*, secured by registered charges on divers properties belonging to each of them, the aggregate value of which was 10,250*l.* Among the properties so charged were Nos. 11 and 11A, Turle Road, held in freehold by the testatrix and subject to a registered charge dated January 31, 1931. At the date of the charge the value of this property was about 3300*l.* For the purposes of probate it was valued at 2650*l.* On June 25, 1935, the plaintiff sold part of the property to the London County Council by private treaty for 1250*l.* On February 15, 1939, he sold the remainder to them for 1500*l.* He paid the purchase money to the Midland Bank, Ld., in reduction of the indebtedness on the joint account.

The surplus rents of this property, after payment of outgoings, were insufficient to provide for a payment of 2*l.* a week to Constance May Griffiths. The plaintiff, however, paid the surplus rents to her from the death of the testatrix to February, 15, 1939, making up the sum of 2*l.* a week out of his own pocket, disbursing for this purpose about 212*l.* In his affidavit the plaintiff stated that he considered himself as trustee of this property for the purposes of the will, and that he made the additional payments, not because he thought he was under any obligation to do so, but because he was anxious to carry out, so far as he could, the wish of the testatrix. The plaintiff never executed any assent to the vesting of the legal estate in the property in himself.

On April 24, 1939, the plaintiff took out a summons to determine (inter alia) whether in the event of the acceptance of the devise by him the will imposed on him a personal liability to pay Constance May Griffiths the sums mentioned therein, irrespective of the value of the testatrix's interest in the property. The defendants were the persons interested under the trust affecting the devise.

*H. E. Salt* for the plaintiff. The will did not create a personal liability. There was only a trust to pay the sister of the testatrix 2*l.* a week out of the rents and profits of this property. The trust was limited to the property or the proceeds of its sale. The direction in the will did not impose a condition. It cannot be suggested that the testatrix intended to thrust on her husband a damnosa hæreditas. Further, it would have been open to the plaintiff at any time to renounce the devise. On his doing so the property would have fallen into residue and he would have got it free of any condition.

In any case the plaintiff never accepted the devise and it is still open to him to disclaim it. In such a case as this the executor would have to execute a written assent to the vesting of the legal estate in himself as beneficiary: Administration of Estates Act, 1925, s. 36, sub-s. 4. As this was not done the property cannot have vested in the plaintiff.

*H. A. Rose* for the defendants. The contest is simply on the question whether the will imposed a condition or created a trust. In the case of the former, if the plaintiff accepted the devise he became personally bound and the obligation on him is the same as if he had entered into a contract to provide this sum: *In re Williames. Andrew* v. *Williames.* (1) No particular form of words is needed to create a condition: Jarman on Wills, 7th ed., p. 1434. This will imposed a condition.

The plaintiff is both executor and beneficiary and his assent to this devise can be implied from his conduct. He must be taken to have accepted the benefit of it. Under s. 36, sub-s. 4, of the Act there is no need for a written assent when the legal estate does not pass from one person to another. In this case the legal estate was already vested in the plaintiff. The only question was as to his equitable interest as devisee. His acts are referable only to the character of devisee having the beneficial ownership of the property: *Doe d. Hayes* v. *Sturges.* (2)

*H. E. Salt* in reply.

FARWELL J. [having stated the facts:] It is said that the plaintiff has never accepted the devise in the will and that accordingly it is still open to him to disclaim it. On the other hand it is said that he must be taken to have accepted the benefit of the devise by his conduct, and that in those circumstances the obligation either to make the weekly payments or provide the 2000*l.* has become binding upon him.

In order to determine this question, I must first consider what is the nature of the devise in this will. It is a devise of the houses in consideration of the devisee paying to this lady the sums in question. It is said that that does not create any personal liability; that there may be a trust in favour of the lady to make the payments to her out of the annual rents of the property, but that there is no personal obligation, and it is pointed out that assuming the devise to impose a personal liability, all the plaintiff had to do was to disclaim it, thereby defeating the condition, since he would nevertheless have taken the property as the sole residuary legatee, and it would have passed to him unfettered by this condition. It is said that that could never have been intended and that the Court should construe this devise not as creating any personal liability, but as a trust which was limited to the property in question or the proceeds of sale of the property. In my judgment the language

(1) (1885) 54 L. T. 105, 106. (2) (1816) 7 Taunt. 217, 222.

in this will is too strong for me to escape from the conclusion that it did create a personal liability upon the plaintiff if he chose to accept the devise. I agree that it was open to him to disclaim it and that thereupon he would have ceased to be under any personal liability, since he would have taken the property as residuary legatee, but notwithstanding that, I think the language of the gift itself is reasonably plain. It is a devise in consideration of his making certain payments. In my judgment that is a gift on a condition, and if the gift is accepted, then the obligation fixes on the devisee and that creates a personal obligation which he has to perform.

This sort of question has arisen in many cases and there are a large number of reported cases in which points of this sort have been considered; but in every case it is a matter of the construction of the particular language used. These words, in my judgment, create a personal obligation and one which becomes binding upon the devisee if he accepts the gift in question.

If that be the true view, then the question arises whether or not the plaintiff has accepted this gift as devisee, or whether it is still open to him to take the line, which would no doubt be much more beneficial to him, of now disclaiming the devise and thereby destroying his personal liability and yet still taking the property as residuary legatee. It is said in the first instance that here the property can never have vested in the plaintiff as beneficiary or devisee because there had been no written assent, and that under the Administration of Estates Act, 1925, s. 36, sub-s. 4, such an assent is necessary. In my judgment that is not the true view. No doubt under the Act if a vendor is selling as beneficial owner taking under a will, the purchaser is entitled to require a written assent in order that he may be satisfied as to the title, and the Act gives him the right to demand it, but in a case of this sort the position is not the same. The legal estate in the property is vested in the plaintiff as legal personal representative and there is therefore no difficulty with regard to that. His equitable interest as devisee depends upon equities and upon whether or not he has done acts which must be treated as amounting to sufficient evidence of assent

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so as to make it impossible for him now to say that he has never accepted this gift.

The question, therefore, in my view on this part of the case is whether the evidence is such that the Court must come to the conclusion that the plaintiff has accepted the gift, taken the devise as beneficial owner, and therefore taken the burden upon himself, or whether it is still open to him to disclaim. It is to be noted that the testatrix died so long ago as 1934. No doubt in 1939 when selling a portion of the property to the London County Council, the plaintiff sold as legal personal representative, but apart from that there is nothing to show that he ever took any steps to disclaim this devise during the years since the lady's death. He collected the rents, he paid the outgoings, and he has made payments to this lady out of the surplus rents and profits, and also to some extent out of his own pocket. He says that he did that because he thought he was a trustee for her of this property, not because he thought he was under any personal obligation and that there is nothing which he has done which now precludes him from saying: "I am not and I never have been beneficial owner of the "property and I now disclaim that position altogether, and "so escape from this obligation." In my judgment I am bound to come to the conclusion that, taking the evidence as a whole, the plaintiff has made it now impossible for him to disclaim. There is sufficient evidence, in my judgment, to show quite plainly that he did accept this devise and has in fact treated himself as the owner in equity of the property, as distinguished from ownership as legal personal representative. I have come to the conclusion, though with considerable regret, that the plaintiff is under an obligation from which he cannot escape to provide this 2000*l.* for the benefit of Mrs. Griffiths and her children. I say I have come to that conclusion with regret, because if the plaintiff had fully appreciated his legal position he could have disclaimed the property and avoided the burden which I now hold rests upon him, but unfortunately for him he did not appreciate the position or take the necessary steps which would have enabled him to disclaim the property and thereby put an

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end to any question as to the liability under this will. In the circumstances I have come to the conclusion that the plaintiff has accepted the devise and that in consequence he has undertaken the burden which was laid upon him as devisee of the property in question. I make a declaration accordingly.

Solicitors: *Mark Lemon; William Bird.*

F. C.

# *In re* BARNES. ASHENDEN *v.* HEATH.

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1940
Jan. 25.

[1939. B. 5112.]

*Industrial and provident societies—Deposit in society—Nomination—Death of nominee in lifetime of nominator—Effect—Industrial and Provident Societies Act,* 1893 (56 *&* 57 *Vict. c.* 39), *ss.* 25, 26—*Industrial and Provident Societies (Amendment) Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 31), *s.* 5.

The power given by the Industrial and Provident Societies Acts to a member of a registered society to nominate a person to whom his property in the society shall be transferred at his decease is in its nature testamentary and the death of the nominee in his lifetime defeats the nomination so that on the death of the member his legal personal representative is entitled to the property.

*Caddick* v. *Highton* (1899) 68 L. J. (Q. B.) 281 not followed.

Observations in *Eccles Provident Industrial Co-operative Society, Ld.* v. *Griffiths* [1912] A. C. 483, 490 adopted.

ADJOURNED SUMMONS.

In 1924 Mary Anne Barnes (hereinafter called "the member") was a member of the Banbury Co-operative Society, Ld. (hereinafter called "the society"), a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, and held a deposit of 100*l.* or thereabouts therein. On November 1, 1924, by virtue of those Acts and of the rules of the society, she made a nomination in writing of that deposit in favour of Agnes Pankhurst (hereinafter called "the "nominee"). Rule 28 of the rules of the society reproduced the provisions of s. 25 of the Industrial and Provident Societies Act, 1893, as amended by s. 5 of the Industrial and Provident Societies (Amendment) Act, 1913. The nomination was as follows: "I, Mary Barnes, . . . . widow, a member of the "Banbury Co-operative Society, do hereby nominate the "following as the only person or persons to or among whom "shall be transferred my property in the Society, whether in "shares, loans, deposits or otherwise at my decease in such "proportion as is set forth below opposite their respective "names. . . . ." Below was written the name of the nominee and the proportion indicated was "all." This nomination

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was duly registered with the society. The nominee died on April 2, 1932, and probate of her will was granted on May 20, 1932, to Thomas Ashenden (hereinafter called "the plaintiff"), the sole executor. On March 11, 1939, the member died without having revoked or varied the nomination. On April 4, 1939, probate of her will was granted to Henry Francis Heath (hereinafter called "the defendant"), the sole executor. Subsequently, at the request of the solicitors for the defendant as executor of the member, the plaintiff, without intending to abandon any rights of the estate of the nominee, signed a form of authority and request addressed to the society consenting that it should account to the estate of the member for the amount of the nomination. The plaintiff having been informed that it was intended to treat this amount as part of the estate of the member, took out a summons on December 19, 1939, to determine whether, on the true construction of the Industrial and Provident Societies Act, 1893, s. 26, the sum in question formed part of the estate of the nominee or of the member.

*Roger Turnbull* for the plaintiff. A member of a registered society may deal with his interest in it by deed—see *In re Griffin. Griffin* v. *Griffin* (1)—by will or by nomination in accordance with the Industrial and Provident Societies Act, 1893, ss. 25, 26, as amended by the Industrial and Provident Societies Act, 1913, s. 5. The question is whether the power of nomination is to be treated as in its nature testamentary. If it were held to be so many difficulties would arise, particularly in connection with the Wills Act, 1837, s. 33. Phillimore J. held in *Caddick* v. *Highton* (2) that, when the nominee under a nomination dies in the lifetime of the member, his legal personal representative is entitled to stand in his position and on the death of the member to take the property nominated. There is no reason why this should not be so. If after the death of the nominee the member wishes to revoke the nomination he can do so. The decision of Phillimore J. has never been overruled and is still binding even if his conclusion does not commend itself to the Court. Nothing in the Acts suggests

(1) [1902] 1 Ch. 135.

(2) (1899) 68 L. J. (Q. B.) 281.

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that the death of the nominee revokes the nomination. The plaintiff is entitled to this property.

*G. A. Rink* for the defendant. This nomination was in its nature testamentary as it was the member's intention to convey benefits by it which would be conveyed if it were considered as a will and her death was the event which was to give effect to it: *Milnes* v. *Foden.* (1) As in the case of a will the nomination was revocable. *Caddick* v. *Highton* (2) was wrongly decided on this point and the authorities relied on by Phillimore J. had no bearing on it. That case could not stand in the face of what was said in *Eccles Provident Industrial Co-operative Society, Ld.* v. *Griffiths.* (3) It was not followed by the Chief Registrar of Friendly Societies who criticized it in *Demee* v. *National Independent Mechanics' Friendly Society.* (4) The law in relation to nominations is stated in Halsbury's Laws of England, 2nd ed., vol. xv., p. 351. The nominee's death operated to revoke this nomination and the defendant is entitled to the property.

*Roger Turnbull* in reply.

Farwell J. [having stated the facts:] The effect of the Industrial and Provident Societies Act, 1893, as amended by the Industrial and Provident Societies (Amendment) Act, 1913, is that a member of the society has a share or interest in it, with which he may deal in a variety of ways. He may withdraw the whole or any part of the money in his lifetime as and when he pleases and to the extent to which he pleases. He may assign it in his lifetime by a duly executed assignment and thereby pass to some one else his interest in the society. He may make a will under which his interest on his death will pass to his legal personal representative, to deal with as he may therein direct. There is also another method by which the depositor may direct the destination of his share up to the sum of 100*l.* after his death. That is set out in r. 28 of the rules of this society which reproduced s. 25 of the Act of 1893 as amended by s. 5 of the Act of 1913. That section is as follows: "(1.) The principal Act shall as respects "nominations made after the commencement of this Act "have effect as if the following provisions were substituted "for section twenty-five of the principal Act :—'(1.) A member "'of a registered society not being under the age of sixteen "'years may, by writing under his hand delivered at or sent "'to the registered office of the society during the lifetime "'of such member or made in any book kept thereat, nominate "'any person or persons to or among whom there shall be "'transferred at his decease such property in the society as "'may be his at the time of his decease (whether in shares, "'loans, or deposits, or otherwise), or so much thereof as is "'specified in such nomination, if the nomination does not "'comprise the whole. If on the death of the nominator the "'amount of his property in the society comprised in the "'nomination exceeds one hundred pounds the nomination "'shall be valid to the extent of the sum of one hundred "'pounds, but not further or otherwise: Provided that a "'person so nominated shall not be an officer or servant of the "'society unless such officer or servant is the husband, wife, "'father, mother, child, brother, sister, nephew, or niece of the "'nominator. (2.) A nomination so made may be revoked "'or varied by a subsequent nomination signed and delivered "'or sent or made as aforesaid or by any similar document "'in the nature of a revocation or variation under the hand of "'the nominator so delivered sent or made as aforesaid, but "'shall not be revocable or variable by the will of the "'nominator or by any codicil thereto. (3.) The society shall "'keep a book wherein the names of all persons so nominated "'and all revocations or variations (if any) of such nominations "'shall be recorded, and the property comprised in any such "'nomination to an amount not exceeding one hundred "'pounds shall be payable or transferable to the nominee "'although the rules of the society declare the shares not to "'be transferable. (4.) The marriage of a member of a society "'shall operate as a revocation of any nomination made by "'him before such marriage, provided that, in the event of

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(1) (1890) 15 P. D. 103, 107.

(2) 68 L. J. (Q. B.) 281.

(3) [1911] 2 K. B. 275, 284; [1912] A. C. 483, 490.

(4) [1919] R. C. R. 8.

"'an officer of a society having transferred any property of "'a member to a nominee, in ignorance of a marriage contracted subsequent to the date of the nomination, the "'receipt of the nominee shall be a valid discharge to the "'society.' (2.) The principal Act shall, as respects nominators "dying after the commencement of this Act, have effect as "if the following provisions were substituted for sub-section (1.) "of section twenty-six of the principal Act :—' (1.) On receiving "'satisfactory proof of the death of a nominator, the committee "'of the society shall, subject to the limitation on amount "'hereinbefore provided, either transfer the property comprised in the nomination in manner directed by the nomination, or pay to every person entitled thereunder the full "'value of the property given to him, unless the shares "'comprised in the nomination, if transferred as directed by "'the nominator, would raise the share capital of any nominee "'to a sum exceeding two hundred pounds, in which case "'they shall pay him the value of such excess'." The Act provides for the event of a nominee being under sixteen years of age. There is a further provision in s. 6 relating to death duty.

The object and the effect of those provisions were stated quite plainly by Lord Mersey in *Eccles Provident Industrial Co-operative Society, Ld.* v. *Griffiths* (1), a case in which the House of Lords affirmed a decision of the Court of Appeal. I need not consider the facts or the decision, but the passage which I desire to read from his speech seems to me to be useful for the present purpose. He said this: "The object of "Section 25 is, in my view, to give to the poorer members of "a Society, that is to say, to those who have not more than "100*l.* to their credit, the power to make provision for the "disposal, at their death, of this small sum without the "expense being incurred of the making of a will or of "administering this part of their estate. The nomination "can only be made by the members who are within this "poorer class, and it is the duty of the secretary of the society, "before he enters the name of the nominee in the society's book,

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(1) [1912] A. C. 483, 490.

"to see that there is not more than 100*l.* to the member's "credit. If the exercise of the right to nominate is delayed "until the amount to the credit is more than 100*l.* the right "itself is lost. Once made the nomination takes effect, not "by creating any charge or trust in favour of the nominee as "against the nominator, as was suggested during the argument "(for the nominator can at any moment revoke the "nomination), but by giving to the nominee a right as against "the society, in the event of the death of the member without "having revoked the nomination, to require the society to "transfer the property in accordance with the nomination. "Until death the property is the property of the member, "and all benefits accruing in respect of it during his lifetime "are his also. The view contended for by the appellants "would make the nomination defeasible not merely by the "statutory revocation provided for the purpose, but by "possible future and uncertain events, such as payments by "the member or credits by the society of sums to the member's "account, having the effect of increasing the total to his "credit at his death to a sum over 100*l.*" Now it is quite clear from what Lord Mersey there said that his view was that under s. 25 of the Act of 1893, the nomination was intended to operate on the death of the depositor and that it was of an ambulatory nature, either to be effective or not as there might or might not be funds up to 100*l.* to answer it at the date of the death of the nominator.

The same view was expressed quite shortly by Farwell L.J. in the same case in the Court of Appeal. He delivered a dissenting judgment which was not approved by the House of Lords, but a sentence in it to which I wish to refer is wholly consistent with what I have read from Lord Mersey's speech, and I think may be taken to be quite accurate. Farwell L.J. said this (1): " Section 25 of the Act of 1893, "like several other sections of the same character in similar "Acts, is in my opinion intended to confer a benefit on "members of societies of this kind by giving them a limited "power of disposition in its nature testamentary without

(1) [1911] 2 K. B. 275, 284.

"the formality and expense of making a will or obtaining "probate. The nomination in pursuance of such a power is, "like any other testamentary disposition, revocable, as, "under the Wills Act, a will is revocable, and, like a will, "does not, prior to the nominator's death, affect his property, "but leaves him free to deal with it as he pleases, either by "withdrawing it in accordance with the rules of the society, "or receiving payment of his loans to the society, without "any power of interference by the nominee. The nominator "is in the position of a testator, and the nominee of a "legatee." From that I think it is quite clear that this section has the effect of giving the depositor a power, in its nature testamentary, to deal up to 100*l.* with his interest in the society. I say "in its nature testamentary," because it has all the characteristics of a testamentary document, that is to say, it is a nomination which has no effect at all until the death of the nominator who is left completely free during his lifetime to deal with his share irrespective of it. The nominee would have no right to complain of, nor could he take any steps to prevent, the nominator dealing with his interest during his lifetime. The nomination has no operation and is not intended to have any operation until the death of the nominator. Whether or not it then operates depends upon whether or not the nominator has during his lifetime either revoked it or used the money which he purported to nominate for his own purposes, by withdrawing it from the society or in some other way. The result, as I said, is that the nature of the nomination in a case of this sort is clearly testamentary.

Now what is the effect of the death of the nominee in the lifetime of the nominator? In Jarman on Wills, 7th ed., p. 398, there is this passage, taken from the original edition of the book, which, in my judgment, is a perfectly correct statement of the law: "The liability of a testamentary "gift to failure, by reason of the decease of its object in "the testator's lifetime, is a necessary consequence of the "ambulatory nature of wills; which not taking effect until "the death of the testator, can communicate no benefit to "persons who previously die: in like manner as a deed "cannot operate in favour of those who are dead at the time "of its execution." Now as this nomination is in its nature ambulatory and operates only on and at the death of the nominator, one would have thought that if the nominee died in the lifetime of the nominator, the consequence would be that his title would lapse, and that, accordingly, his legal personal representative would not be entitled to the money, which would remain part of the property of the nominator. Speaking for myself, I should have had no difficulty in coming to that conclusion, because, as I said, it appears to me that this nomination has all the elements of a testamentary disposition and is, therefore, governed, so far as the question of lapse is concerned, by the ordinary rule in regard to a testamentary disposition. It has been suggested that such a decision might give rise to all sorts of difficulties—questions as to whether s. 33 of the Wills Act, 1837, applied, and problems of that kind. But those are matters which can be dealt with if and when they arise. So far as I am concerned, I should have no doubt, provided the matter were open to me and free from authority, in coming to the conclusion that the death of the nominee in the lifetime of the nominator operated to cause lapse.

The difficult question in this case is whether I am free to decide in what I think to be the right way, notwithstanding that in 1899 Phillimore J., as he then was, came to a contrary conclusion in *Caddick* v. *Highton.* (1) The headnote in that case is as follows: "Life policies in friendly societies are not "assignable by deed, but may be the subject of nomination. "Where the nomination has never been revoked and the "nominee has died in the lifetime of the nominator, the legal "personal representative of the nominee is entitled to stand "in the position of the nominee, and upon the death of the "nominator to receive the policy moneys from the society." The first part of that decision has been disapproved by the Court of Appeal in the case of *In re Griffin. Griffin* v. *Griffin* (2), but the second part which relates to the question before me has not ever been expressly overruled by the Court of Appeal or by the House of Lords, and so far as I know, there is no reported case in which it has been actually criticized. In the ordinary way questions of this sort under the Industrial and Provident Societies Acts do not come before the Court at all. They are in almost all cases decided either by the person nominated under the rules of the particular society, or by the Chief Registrar of Friendly Societies. I am told that this decision has not been followed by the Chief Registrar, and I have been referred to *Demee* v. *National Independent Mechanics' Friendly Society* (1), a case in which he expressed his disapproval of it, stating the reasons for which he thought it was not correct and refusing to follow it. Since that time the Chief Registrar has not followed the decision of Phillimore J. on this particular point. Of course, the fact that he has acted contrary to that authority is not a ground justifying me in adopting the same course, but it affords some explanation why this part of the decision of Phillimore J. has not apparently been either approved or disapproved in the High Court.

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(1) 68 L. J. (Q. B.) 281.

(2) [1902] 1 Ch. 135.

Now Phillimore J. in the part of his judgment which is relevant to the question which I have to consider to-day reached his decision upon the authority of two cases relating to the Customs Annuity and Benevolent Fund, and he seems to have come to the conclusion that so far from a nomination of this kind being of a testamentary character, it was of the same nature as an appointment under a power of appointment by deed. On that ground he came to the conclusion that the death of the nominee did not affect the right of his legal personal representative to receive the fund. The passage in his judgment which I must read is as follows (2): "The "plaintiff then falls back upon his lower and lesser title as "representative of the nominee. I say lower and lesser title "because the estate of the nominee is a much less valuable "one than the estate of the assignee. He is liable to be "divested of his estate by the revocation, at any moment, of "the nomination. Counsel for the plaintiff has contended "that it can only be divested in that way. The language of

(1) [1919] R. C. R. 8. (2) 68 L. J. (Q. B.) 281, 282.

"the Court of Appeal in *Bennett* v. *Slater* (1) helps me in "favour of the conclusion contended for by counsel for the "plaintiff, and I think that case shows that the nearest "analogy to this class of instruments is an appointment by "deed under a power, and not an appointment by will or "other testamentary disposition." With the greatest respect to Phillimore J., I am wholly unable to agree with that expression of view. It seems to me that a nomination of this sort has all the characteristics of a testamentary disposition rather than an appointment by deed, and, so far as that passage in that judgment is concerned, I cannot accept it as correct. I should add, that it is wholly inconsistent with what was said by Farwell L.J. in the Court of Appeal in the case to which I have referred, and with what was said by Lord Mersey in the same case in the House of Lords. Then the judgment continued: "Certainly a number of cases "upon the Customs Annuity Fund, two of which—*Attorney-* "*General* v. *Abdy* (2), and *In re Phillips' Insurance* (3)—have "been referred to, and which have been decided from time to "time during the period that these Friendly Societies Acts "have been renewed and recodified, point in the same "direction." These two decisions, in my judgment—I say this without disrespect—have nothing whatever to do with the particular circumstances of such a case as I am considering and as he was considering. I am unable to follow him so far as he claimed to find any assistance in them and I do not see that they can afford any guidance in this case. Then Phillimore J. proceeded: "I think that affords a very close analogy to "this case, and I cannot see why the estate of a nominee "should be deprived of the benefit intended to be conferred "by the nominator because the actual nominee happens to "die—although his death may be unknown—before the "nominator." The answer to that point, I venture to think, is that once it is established that the nomination is in the nature of a testamentary disposition, the reason is apparent. It is an ambulatory document and only takes effect on the death

(1) [1899] 1 Q. B. 45.
(2) (1862) 1 H. & C. 266.
(3) (1883) 23 Ch. D. 235.

of the nominator. Phillimore J. continued: "The legal "personal representative of the party to a contract is always "entitled, and in many cases is bound, to stand in the shoes "of his principal. I do not see anything in the words relied "on by counsel for the defendants, that the society will pay "the nominees in all cases, to prevent this money being due "to the legal personal representative of the nominee, and "therefore I decide this case in favour of the plaintiff upon "the second ground, which is that the legal personal representative of a nominee where the nomination has not been "revoked is entitled to stand in the position of the nominee "and to receive the policy moneys from the society." I am unable to agree with that judgment in so far as it is based, first, on the decisions relating to the Customs Annuity and Benevolent Fund, and, secondly, in so far as it is based on the statement which is contained in it, that the analogy to a nomination of this sort is an appointment by deed and not a testamentary disposition. That being so, if it were not for this authority, I should have no hesitation in deciding in the opposite way.

But it was urged, and I was impressed with this point, that this decision of Phillimore J. in 1899 has not been expressly overruled, and unless there were some ground other than my own personal view for believing it to be wrong, I think I ought to follow it. Having considered what was said by Lord Mersey and by Farwell L.J. in the case to which I have referred, I have come to the conclusion that it is open to me now to say that in the light of their statements, the decision of Phillimore J. was based on a wrong ground, and is, therefore, one which I need not follow. The basis of his judgment on this part of the case is that he took the view that a nomination of this sort was in its nature like an appointment by deed and not a testamentary disposition, and that in the light of the statement of Lord Mersey and Farwell L.J. was clearly an erroneous view. Therefore, I cannot follow that decision in this case, and I must come to the only conclusion possible, having regard to the nature of this particular document and its effect under the rules of

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the society, namely, that the death of Mrs. Pankhurst in the lifetime of Mrs. Barnes defeated the nomination in her favour, with the result that at the death of Mrs. Barnes her legal personal representative was entitled to the money in question.

Solicitors: *Wrinch & Fisher, for Murton, Clarke & Murton-Neale, Hawkhurst; Bristowes, for Fairfax, Barfield & Co. Banbury.*

F. C.

## *In re* BECKETT'S SETTLEMENT.

## *In re* BECKETT (DECEASED).

## EDEN *v.* VON STUTTERHEIM.

SIMONDS J.

1940
Jan. 24.

[1939. B. 5028.]

*Settlement—Advancement—Exercise of statutory power—Consent of persons entitled to any prior life or other interest—Objects of a discretionary trust not so entitled—No consent required—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 32, *sub-s.* 1 (*c*).

Persons who are for the time being objects of a discretionary trust or power are not "entitled to any prior life or other interest, vested or contingent," within the meaning of s. 32, sub-s. 1 (*c*), of the Trustee Act, 1925, and therefore their consent to the exercise of the statutory power of advancement contained in that section and thereby implied in a settlement is not necessary.

SUMMONS.

By a settlement dated December 17, 1926, and made between Sir William Gervase Beckett of the one part and the said Sir William Gervase Beckett, the Right Honourable Robert Anthony Eden and William Winterbotham, of the other part, Sir William Gervase Beckett directed the trustees to stand possessed of 3000 shares of 1*l.* each in Westminster Bank, Ld., upon trusts for sale and investment, and subject thereto to hold the said shares and the investments representing the same during the term of seven years from the date thereof or the life of the settlor, whichever period should be the longer, upon certain trusts for the maintenance, education and benefit of the children of his daughter, now Baroness von Stutterheim, and after the death of the settlor upon trust during the life of his said daughter to apply the income or some part thereof for the maintenance and support or otherwise for the benefit of his said daughter during her life or of all or one or more exclusively of the other or others of her issue by her then present or any subsequent marriage as the trustees should in their absolute discretion think fit, and after the death of his said daughter in trust for all or such one or more exclusively of the others of such issue as the settlor should appoint, and

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in default of appointment in trust for all the children of Baroness von Stutterheim who should survive their mother and attain the age of twenty-one years or being daughters should marry under that age.

The settlement contained no express power of advancement in the trustees.

A similar discretionary trust in favour of the settlor's daughter and any husband or issue of hers was contained in the will dated April 27, 1932, of Sir William Gervase Beckett. The will contained an express power of advancement in a form very similar to that contained in the Trustee Act, 1932. Sir William Gervase Beckett died on August 24, 1937, and his will was duly proved on October 18, 1937, by the plaintiffs, his executors.

The settlor's daughter was married in 1919 to John Arthur Davison, and there were issue of this marriage three daughters, the defendants, Mabel Dorothy Davison, Ann Davison and Jane Davison, all still infants. In 1928, this marriage was dissolved on the petition of Mrs. Davison, and on July 10, 1929, she married Baron von Stutterheim. There were no issue of her present marriage. The eldest daughter, Mabel Dorothy Davison, had recently become engaged to be married, and it was proposed to make a settlement upon her marriage, and to obtain the approval of the Court thereto under the Infant Settlements Act, 1855. The trustees of the above settlement desired to exercise the power of advancement contained in s. 32 of the Trustee Act, 1925, in favour of Miss Davison. The summons was taken out to determine the question whether the plaintiffs, as trustees of the above mentioned settlement were entitled to exercise the statutory power of advancement without the consent of any object of the discretionary trust or power contained in the settlement, or whether they could only exercise such power after obtaining the consent of all persons, objects of the discretionary trust or power.

*F. Renfield* for the plaintiffs, trustees of the settlement.

*R. Cozens Hardy Horne* for the defendants Baroness von Stutterheim and Mabel Davison.

The statutory power of advancement is applicable. The trustees have the widest possible discretion as to the application of the income and no one can call for any part of it. The objects of the discretionary trust are not persons entitled to any prior life or other interest and therefore their consent is not required. The point would have arisen in *In re Stimpson's Trusts* (1), where the consent to be obtained was that of a tenant for life whose interest was forfeited on alienation, but he agreed to consent to the advancement, whether his interest was forfeited or not, and so the question which has now arisen was never argued. The whole of the argument there was on sub-s. 2.

The objects of the power could bring an action to enforce the trust, but none of them could sue to recover any particular part of the income. In *Sweetapple* v. *Horlock* (2) it was held by the Court of Appeal that a wife was not " entitled to or " interested in " property which she took under the exercise of a power of appointment made after the date of her marriage settlement, and therefore that it was not bound by a covenant to settle all property she was then entitled to, though she took the same share as she would otherwise have taken in default of appointment.

Until the money has been actually paid over by the trustees, none of the defendants are entitled to anything. If any other construction were adopted, the greatest inconvenience would be caused to beneficiaries in similar circumstances.

Under the testator's will there is an express power of advancement subject to a condition as to consent which is in almost exactly the same form as s. 32 of the Trustee Act, 1925.

*E. Winterbotham* for the infant defendants Ann Davison and Jane Davison.

The effect of the section is that the power of advancement can only be exercised with the consent of all the persons who are or might be interested, and this includes the objects of a discretionary trust. The words " entitled to a prior life or " other interest " are wide enough to cover them. " Property " as defined in s. 68, sub-s. 11, of the Act includes

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(1) [1931] 2 Ch. 77.

(2) (1879) 11 Ch. D. 745.

"any estate share and interest in any property, real or "personal . . . . and any other right or interest, whether in "possession or not."

It is agreed that the decision in *In re Stimpson's Trusts* (1), so far as it goes, is against this contention, but it does not appear to have occurred to any one in that case that there was a point on this proviso to be argued. If all the persons interested under a discretionary trust are sui juris they can control the discretion of the trustees, and are entitled to have the whole fund applied for their benefit: *In re Smith. Public Trustee* v. *Aspinall.* (2) An interest under a discretionary trust can be assigned and can vest in a trustee in bankruptcy. A settlor who reserves to himself an interest under a discretionary trust makes that interest liable to estate duty: *Attorney-General* v. *Farrell* (3) and *Attorney-General* v. *Heywood.* (4)

[Simonds J. referred to *Sweetapple* v. *Horlock.* (5)]

That decision has been treated as applying to cases where a wife was the sole object of a power. Under the provisions of the testator's will, there is also a discretionary trust, but surplus income is to be added to the capital. To the extent that the trustees do not exercise their powers, income added to capital becomes a contingent interest in the daughters.

The settlement will be made in any event, whatever the decision on the question of consent to the advancement, the reversionary interest being settled if consent which cannot now be given is necessary.

*Cozens Hardy Horne* in reply.

*Attorney-General* v. *Farrell* (3) was a decision on a special provision in the Finance Act, 1894, to prevent a person evading the payment of estate duty. Greer L.J. there said (6) that the trust did not confer on the settlor any legal right whatever; he only had in a colloquial sense an interest in the estate. It cannot be said that a person who is the object of a power, either a discretionary power or a power of appointment, has a

(1) [1931] 2 Ch. 77.
(2) [1928] Ch. 915.
(3) [1931] 1 K. B. 81, 95.
(4) (1887) 19 Q. B. D. 326.
(5) 11 Ch. D. 745.
(6) [1931] 1 K. B. 100, 101.

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legal interest. [He referred to Key & Elphinstone's Precedents in Conveyancing, Prideaux Precedents in Conveyancing, and The Encyclopædia of Forms and Precedents, in each case of the last edition before 1926.]

Simonds J. The late Sir William Gervase Beckett, on December 17, 1926, made a settlement of certain shares on his daughter, then Mrs. Davison. She has, since that date, divorced her husband and is now the Baroness Cynthia Maud von Stutterheim, the first defendant in these proceedings. The trusts of that settlement, so far as they are material to be stated, are these. The trustees were, after a certain term of years, which has now expired, during the remainder of the life of the Baroness to apply the income of the trust fund, or such part thereof as they should think fit, to the maintenance and support or otherwise of the Baroness, or all or one or more exclusively of the other or others of her issue by her then present or any subsequent marriage as the trustees in their absolute discretion should think fit, and after her death then in trust for her children as she should appoint and in default of appointment equally between them if they should attain the age of twenty-one or, being daughters, marry under that age. That settlement contains no power of advancement in the trustees.

The Baroness has had by her first marriage three children, of whom the eldest, the defendant Mabel Dorothy Davison, though still an infant, is about to be married. The trustees desire, if it is competent for them to do so, to raise a sum of money under the power of advancement and settle it on her marriage. The question of the approval of her settlement under the Infant Settlements Act, 1855, is before me in other proceedings. The question here is whether they have a power of advancement under the statute.

The provision with regard to advancement is contained in s. 32 of the Trustee Act, 1925, which provides: "Trustees "may at any time or times pay or apply any capital money "subject to a trust, for the advancement or benefit, in such "manner as they may, in their absolute discretion, think fit, "of any person entitled to the capital of the trust property "or of any share thereof, whether absolutely or contingently "on his attaining any specified age or on the occurrence of "any other event, or subject to a gift over on his death under "any specified age or on the occurrence of any other event, "and whether in possession or in remainder or reversion, and "such payment or application may be made notwithstanding "that the interest of such person is liable to be defeated by "the exercise of a power of appointment or revocation, or to "be diminished by the increase of the class to which he "belongs." Subject to certain provisoes, to which I shall have to refer, it is quite clear that the trustees have the power of advancement.

I have, however, to consider the provisoes. There are three. The first proviso is : " (*a*) the money so paid or applied "for the advancement or benefit of any person shall not exceed "altogether in amount one-half of the presumptive or vested "share or interest of that person in the trust property." That proviso will be complied with. Then, secondly : " (*b*) if that "person is or becomes absolutely and indefeasibly entitled to "a share in the trust property the money so paid or applied "shall be brought into account as part of such share." That, no doubt, will be duly taken care of.

It is the third proviso which is material in this case : "Provided that . . . . (*c*) no such payment or application shall "be made so as to prejudice any person entitled to any prior "life or other interest, whether vested or contingent, in the "money paid or applied unless such person is in existence and "of full age and consents in writing to such payment or "application." Fortunately it is not necessary for me to decide in this case what is the purpose of inserting the words "unless such person is in existence " in that proviso. For my part I wholly fail to see how a person can be entitled to a life or other interest unless he is in existence and, therefore, what the purpose of putting in the words " unless such person is in "existence " may be I cannot tell. However, the real point in this case is whether the persons who are the objects of a discretionary trust are persons who, within the meaning of that proviso, have to be consulted and their consent obtained before the power of advancement is exercised. It is quite true that in one sense the objects of a discretionary trust have an interest in the fund which is being administered for their benefit. It is so far true that if the whole of the fund is applicable for their benefit, and they are of full age, they are together entitled to put an end to the discretionary trust. If authority is needed for that obvious proposition it is to be found in *In re Smith.* (1) Again, if any authority is needed for the proposition that in such circumstances the object of a discretionary trust has an interest in the fund it is to be found in the line of authority of which the *Attorney-General* v. *Farrell* (2) may be taken as an example, where it was held that for the purpose of the Finance Act, 1894, which was there under consideration, a settlor reserves to himself an interest in a settled fund if he remains under its provisions one of the objects of a discretionary trust.

That, however, is not quite the point which I have to decide. I have to decide whether an object of a discretionary trust is on the true construction of the words, "entitled to any "prior life or other interest, whether vested or contingent." I think, according to the ordinary language of conveyancing, and that is what I have to bear in mind for the purpose of construing this statute, it would not be right to predicate of a person who is the object of a discretionary trust that he is entitled to a vested or contingent interest in the trust fund. One can only base one's view on experience of conveyancing practice, and, in my view, although, indeed, the object of a discretionary trust has an interest in equity in the trust fund, yet he would not be appropriately described as a person entitled to an interest, vested or contingent. I think that in construing these words I must bear in mind, too, the general idea and scheme of a settlement in which—(*a*) a discretionary trust and (*b*) an advancement clause are inserted. I do not think that it would be right to impute to any settlor, where there is in the first place a discretionary trust embracing a wide number of objects, and there is also a power of advancement,

(1) [1928] Ch. 915.

(2) [1931] 1 K. B. 81, 95.

the intention to fetter the discretion of the trustees with regard to advancement by imposing on them the obligation to obtain the consent of all the persons, many of them perhaps infants and unable to give their consent, who were interested under the terms of the discretionary trust.

Accordingly, I think that I must come to the conclusion in this case, although the matter is difficult and obscure, that it is competent for the trustees to exercise the statutory power of advancement without obtaining the consent in writing of any of the persons who are the objects of a discretionary trust.

Solicitors: *Waterhouse & Co.*

H. L. L.

## ABINGDON CORPORATION *v.* JAMES.

[1938. A. No. 2775]

## SAME *v.* THANE.

[1938. A. No. 2776]

SIMONDS J.

1939

Dec. 14, 15, 19.

1940

Feb. 7.

*Public health—Water main—Access for maintenance and repair—Corporation main laid in rural area—House built over main with consent of local authority—Sale to purchaser without notice of easement—No deposit of map showing main—Mandatory order—Suspension—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 26, 54*—Public Health Act,* 1875 (*Support of Sewers*), *Amendment Act,* 1883 (46 *&* 47 *Vict. c.* 37), *s.* 3, *sub-s.* 3*—Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 25, 119, 120.

A municipal corporation, in exercise of their powers under the Public Health Act, 1875, constructed a water main leading to their reservoir, and passing through the adjoining rural district. Part of the main was laid in agricultural land, the owner of which, A., claimed and was paid compensation for damage, past or future. In 1936 A. sold some of the land through which the main passed to L., who built two houses upon it and sold them to the defendants. Notice was given to L. of the existence of the main, but no requisition as to easements was made on the sale to the defendants, and they had no notice of any. The plans for the houses were submitted to and passed by the rural district council, but no consent of the corporation to their erection was obtained or applied for.

The corporation sued for an injunction to restrain the defendants from allowing the houses to remain so as to prevent the plaintiff's from having free and speedy access to their water main :—

*Held*, that the corporation's rights had been infringed. They did not know that the houses were being built until after their completion, and they could not be debarred from their rights by their failure to deposit a map or plan showing the main with the clerk of the rural district council, in accordance with s. 3, sub-s. 3, of the Public Health Act, 1875, Amendment Act, 1883, incorporating the Waterworks Clauses Act, 1847.

*Held*, further, that s. 25, sub-s. 3, of the Public Health Act, 1936, as to buildings erected over a water main without the consent of the local authority had no application to the case. The Act, which did not come into force until after the houses had been built, did not deal with the case where a main belonging to one authority was laid in the area of another authority, and there was no provision requiring the consent of the corporation. The only consent required was that of the authority in whose area the main and the houses were situate.

*Held*, therefore, that the plaintiffs were entitled to a mandatory order for the removal of the houses, but the Court suspended its operation for twelve months.

*Goodhart* v. *Hyett* (1883) 25 Ch. D. 182 applied.

The facts were stated by his Lordship in his judgment as follows. In each of these actions the plaintiffs in exercise of the powers conferred on them by the Public Health Act, 1875, and the Abingdon Water Order, 1931, constructed and laid a 9-inch water main from land owned by the corporation southwards along the public highway known as Dry Sandford Lane for a distance of about 160 yards, and thence in a south-easterly direction for about 1300 yards across certain fields in the parish of St. Helen Without and thence in a south-easterly direction along the public highway known as Wootton Road to their existing waterworks at the junction of Wootton Road and Foxcombe Hill. The land in question is without the district of the plaintiffs and within the district of the Abingdon Rural District Council. For part of its course the main so laid passed into and under the land of one W. C. Amey, who claimed and received compensation for the exercise by the plaintiffs of their rights. He was content to accept a sum of 36*l.* 5*s.*, which in the receipt signed by him and dated February 6, 1938, was expressed to be " compensation for any "past present or future damage in connection with the laying "and maintenance of a water main and any other works by "the corporation between Lashford Lane and to their Wootton "Waterworks."

Shortly thereafter Amey sold the land to one Francis Herbert Lister with full notice of the existence and line of the main. Lister proceeded to build on the land and in particular built two houses, one called the Chateau, which he afterwards sold to the defendant Thane, and the other called Croesaw, which he afterwards sold to the defendant James. It was established that the main passes diagonally right under the centre of the Chateau and passes under the corner of Croesaw. The defendants did not know this fact. It appears that they purchased through a building society. They did not, nor did anyone on their behalf, ask whether there were any easements affecting the land proposed to be sold. Lister did not volunteer the information.

The pipe was of cast iron with leaden sockets and laid at some distance below the surface. The task of construction was difficult, it being often necessary to blast through the solid rock. The pipe worked as a syphon, so that a crack which let in the air would have more serious consequences than the waste by leakage of a certain amount of water. It would result in the complete stoppage of an important part of the plaintiffs' water supply.

*W. P. Spens K.C.* and *F. McMullan* for the plaintiffs. Under s. 119 of the Public Health Act, 1936, a local authority who supply water have the same powers and duties with regard to the laying and maintenance of water mains within or without district as they have under Part II. of the Act with respect to the construction and maintenance of public sewers. Part II. is comprised in ss. 14 to 90 of the Act. The effect is that under s. 25 buildings may not be erected over the site of any water main shown on the map of the water mains required by the combined effect of ss. 32 and 119 to be kept in their offices, and the authority is bound to reject any plans for such erection. In this case the pipe was laid before the house was built. It would be impossible to get at the pipe to repair it, if necessary, without pulling the house down: *Goodhart* v. *Hyett* (1); *Thurrock, Grays, and Tilbury Joint Sewerage Board* v. *Goldsmith, Ld.* (2)

The pipe was laid by the plaintiffs through what was then a field, with the consent of the then owner. He was paid compensation by the plaintiffs and gave them a receipt. The effect of that receipt is to create a statutory easement in favour of the plaintiffs to go upon the land and repair and maintain their water main. That right cannot be exercised if there is a house built on the land through which the water main passes. The plaintiffs are therefore entitled to a mandatory order to have the houses, or at least one of them, removed.

*J. Leonard Stone* for the defendants. The defendants are purchasers for value without notice of any easement. The

(1) 25 Ch. D. 182.

(2) (1914) 79 J. P. 17.

two houses were erected with the consent and approval of the local authority in whose area they are situate, i.e., the Abingdon Rural District Council, and not the plaintiffs. The consent referred to in s. 25 of the Public Health Act, 1936 (1), is the consent of the local authority in whose area the house is situate.

The Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, s. 3, sub-s. 3 (2), therefore has no application to the present case. And see the Waterworks Clauses Act, 1847, ss. 19 and 20; and *Ilford Urban District Council* v. *Beal and Judd.* (1) Under these sections it is the duty of the undertakers, that is to say the plaintiffs in the present case, to make a survey and map of their district showing thereon all pipes, underground works and conduits, and to deposit copies of the map with the clerks of the peace and of the local authorities in whose area any such pipes or conduits are situate. The material sections of the Waterworks Clauses Act, 1847, which originally applied only to mining areas, were incorporated in the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, by s. 3. The duty of providing this map and supplying a copy to the Abingdon Rural Council has not been carried out by the plaintiffs. Therefore the rural council were entitled to pass the plans of the two houses erected over the main. Under s. 25 of the Public Health Act, 1936, the duty to reject the plans only arose in the case of buildings proposed to be erected over mains shown on the official map, but here no map had been provided, and the officials of the rural council knew nothing about the existence or position of the main.

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(1) Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), s. 25: "(1.) Where plans of a building "or of an extension of a building "are, in accordance with building "bye-laws, deposited with a local "authority, and it is proposed to "erect the building or extension, "as the case may be, over any "sewer or drain which is shown "on the map of sewers required "by this Part of this Act to be "kept deposited at the offices "of the authority, the authority "shall reject the plans, unless "they are satisfied that in the "circumstances of the particular "case they may properly consent "to the erection of the proposed "building or extension, either "unconditionally or subject to "compliance with any require-"ments specified in their consent.

"(2.) Any question arising under "the preceding sub-section between "a local authority and the person by "whom or on whose behalf plans "are deposited as to whether. . . . , "and if and on what conditions, "a consent ought to be given by "the local authority, may on the "application of that person be "determined by a court of sum-"mary jurisdiction.

"(3.) If before the commence-"ment of this Act a building has "been erected over a sewer with-"out such consent, if any, as "under section twenty-six of the "Public Health Act, 1875, was re-"quired at the date of the erection "of the building, the local authority "may by notice require the owner "of the building to pull it down "or to alter it in such manner as "may be necessary."

"The provisions of Part XII. of "this Act with respect to appeals "against, and the enforcement of, "notices requiring the execution of "works shall apply in relation to "any notice given under this "sub-section."

(2) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3: "The provisions of the "Waterworks Clauses Act, 1847, "sections eighteen to twenty-seven "(both inclusive), with respect to "mines, shall, in relation to any "sanitary work of a local authority, "be deemed to be incorporated "with this Act and with the "Sanitary Act under the authority "of which such sanitary work has "been or is constructed or is main-"tained with the following modi-"fications (that is to say):—. . . .

"(3.) As regards sanitary "works existing at the passing of "this Act the local authority "shall cause the survey and "map referred to in section nine-"teen of the Waterworks Clauses "Act, 1847, to be made within "twelve months after the passing "of this Act."

No approach has been made with regard to asking for permission to inspect or to repair the main since the action was commenced. No notice has been served to pull down the defendant James's bungalow: the pipe only runs under a shed at the back of the premises, but it does run under the defendant Thane's house.

See ss. 285, 290 and 300 of the Public Health Act, 1936. The present is not a case in which the Court should interfere: the Act provides a perfectly simple remedy on application to a court of summary jurisdiction. If a statute provides a new right, and provides a remedy for a breach of that right, the presumption is that no other remedy is available. Whether or not there is jurisdiction to do so, the present is not a case in which the Court would grant relief: see Lumley on Public Health, 10th ed., at p. 78.

The Public Health Act, 1875, by s. 26, provided for a penalty for unauthorized building over sewers, but this section has practically been repealed by the Act of 1936.

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(1) [1925] 1 K. B. 671.

The present defendants have never been required to do anything to satisfy the plaintiffs. The plaintiffs took the matter up with the defendants' predecessors in title, and then sued the defendants who are innocent purchasers for value without notice. The evidence and correspondence of 1937 show that at that time the plaintiffs did not know exactly where the pipe was.

*W. P. Spens K.C.* in reply. The effect of any consent by the rural district council to the building of the houses depends on the law at the date when the consent was given. That was the Public Health Act, 1875, and not the Act of 1936, which did not come into force until October, 1937, more than a year after the consent.

The consent which might be given under s. 26 of the Public Health Act, 1875, was a limited form of consent which could only be given by an urban authority. But under an Order of the Minister of Health of 1931, rural authorities may be given certain powers of urban authorities. A consent by a rural authority to build over a sewer or a water main can only refer to a sewer or main belonging to it and in its own area. The defence would be effective if the main belonged to the Abingdon Rural District Council. The consent of the plaintiffs was not even asked. The machinery to which s. 25, sub-s. 3, of the Public Health Act, 1936, applies has nothing to do with the present case.

The latest date at which the plaintiffs' rights were acquired was on the completion of their works in 1934. No subsequent failure to comply with any statutory provisions can deprive the plaintiffs of those rights. An injunction is their only legal remedy.

*Cur. adv. vult.*

1940. Feb. 7. SIMONDS J. [after stating the facts, as above :] In these circumstances the plaintiffs contend that they are entitled to the relief claimed by the writ.

By s. 119 of the Public Health Act, 1936, which replaces

s. 54 of the Public Health Act, 1875, they have the like powers and duties, and are subject to the like restrictions, in respect of the laying and maintenance of water mains within or without their district as they have and are subject to in respect of the construction and maintenance of public sewers. Among their duties there is the duty prescribed by s. 23, namely, to maintain, cleanse and empty all sewers vested in them or, mutatis mutandis, to maintain all water mains vested in them.

They say, in the first place, that they have the right which every dominant owner has to enter on the servient tenement for purposes of maintenance and repair and to require that the servient owner shall not make the exercise of that right practically impossible or substantially more difficult.

They say, in the second place, that this view of their rights is supported by the fact that they are under a statutory duty which the erection of these houses makes it substantially more difficult if not practically impossible for them to perform.

There has been some discussion before me which of the phrases "susbstantially more difficult" or "practically "impossible" is the appropriate one. In *Goodhart* v. *Hyett* (1), where the facts were very similar to those in the case before me, except that there the plaintiff did not assert a statutory duty and the defendant had not begun to build over the line of pipes, North J. used these words: "But the fact that the plaintiffs "would continue to have the right to do it"—that is, to enter and repair—" is not enough. They must have the opportunity "and the means of doing it. . . . In my opinion they will "not, and my reason is this." Having given his reason and further discussed the position, the learned judge said: "It "seems to me that the plaintiffs will not have the same "opportunity that they had before, and will not have reasonable "means of access for the purpose of doing such repairs as must "necessarily be wanted, and, therefore, that the defendant "is doing something which interferes with the right of the "plaintiffs." On this footing North J. granted the appropriate injunction.

In *Birkenhead Corporation* v. *London and North Western*

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(1) 25 Ch. D. 182, 187.

*Ry. Co.* (1) the facts were that the plaintiffs claimed compensation from the defendants on the ground that access to the sewer, which was vested in them under a local Act, had been rendered more difficult and expensive by reason of the defendants having constructed an embankment over it. Their claim was dismissed on a consideration of the Local Act which conferred on them the right to construct a sewer and vested it when constructed in them. That Act gave them no express right of access to the sewer when constructed, and it was held that the true rule of construction was not to imply any further right of access than was reasonably necessary to enable them to perform their duty. "One ought," said Bowen L.J. (2), "only to imply that the statute gave "the Commissioners such powers as were reasonably nec-"essary for the efficient working of the sewer system. For "the purpose of so working it no particular mode of access, "nor any particular degree or convenience of access is wanted, "but all that is wanted is a right to go on the land of the "owner and to get to the sewer, and such owner is not to do "anything which would make it practically impossible for the "plaintiffs to go on such land and exercise such right."

In *Thurrock, Grays, and Tilbury Joint Sewerage Board* v. *E. J. and W. Goldsmith, Ld.* (3), a somewhat similar question came before Eve J., but, inasmuch as he distinguished *Birkenhead Corporation* v. *London and North Western Ry. Co.* (1) on the ground that the canon of construction applied in that case was not properly applicable to a contract such as he had to consider, I am not able to derive any great assistance from his judgment.

In *Metropolitan Water Board* v. *London and North Eastern Ry. Co.* (4) Tomlin J. adopted the language of North J. in *Goodhart* v. *Hyett* (5) and held that the defendants were not justified in an operation which would substantially diminish the reasonable access of the plaintiffs to their main for the purposes of inspection and repair, notwithstanding that they claimed to be protected by the terms of their agreement.

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(1) (1885) 15 Q. B. D. 572.
(2) Ibid. 579.
(3) 79 J. P. 17.
(4) (1924) 131 L. T. 123.
(5) 25 Ch. D. 182, 187.

No other case was cited to me in which this aspect of the right of access of the dominant owner has been discussed. It is, however, in my judgment, unnecessary for me to seek to define with nicety the measure of interference with the right of access for purposes of repair which is enjoyed by the dominant owner, in which expression I include a statutory authority invested with a duty of maintenance. Whatever test is adopted—" material interference," " substantially greater "difficulty " or " practical impossibility "—I must come to the conclusion on the facts of this case that the plaintiffs' right of access has been infringed. It is true that they might not for very many years require to inspect or repair the main where it passes under the defendants' houses. But it is true, also, that they may require to do it at any time and to do so with the least possible delay. It is suggested that they could do anything which had to be done by tunnelling from outside the walls of the houses. This appears to me a theoretical rather than a practical possibility. I see no reason to suppose that even in *Birkenhead Corporation* v. *London and North Western Ry. Co.* (1) the Court intended to impose on the dominant owner so heavy a burden. It is not to be forgotten that, inasmuch as the plaintiffs' easement is exercised by means of a pipe laid in the servient tenement, they might be liable to the servient owners to make good any damage done by the pipe falling into disrepair, apart altogether from the statutory duty of repair.

In these circumstances the plaintiffs are entitled to relief unless the defendants can make good any of the contentions to which I shall next refer, and, if they are entitled to relief, they are, in my judgment, entitled to a mandatory order.

The defendants, however, urge a number of reasons why a mandatory order should not be made. In the first place they say that the plaintiffs stood by and knowingly allowed these houses to be built along the line of the main without protest. On the facts I find that this contention is ill-founded.

(1) 15 Q. B. D. 572.

It was not until after the event brought to the knowledge of any responsible officer of the plaintiffs that the houses had been so built. On the other hand, it appears that the defendants' predecessor in title, Lister, was told by Amey and knew where the main lay and nevertheless built over it.

In the second place, the defendants say that the plaintiffs were required by the combined effect of ss. 20 and 21 of the Waterworks Clauses Act, 1847, and s. 3 of the Public Health Act, 1875 (Amendment) Act, 1883, to deposit a map or plan of the main with the Abingdon Rural District Council, and that, not having done so, they are not entitled to a mandatory order. Assuming, without deciding it, that these sections had any application to the present case, I am unable to see why the plaintiffs' failure to comply with the provisions of the section should debar them from relief. The statute provides the appropriate penalties for non-compliance with its provisions. It would not, in my judgment, be right further to penalize the plaintiffs by making more difficult the discharge of their statutory duty.

Finally, it was urged that the Public Health Act, 1936, itself prescribes the circumstances and the manner in which a building built over a water main may be ordered to be pulled down and that the jurisdiction of the Court to make a mandatory order to that end is either ousted or as a matter of discretion ought not to be exercised. This contention requires an examination into the relevant provisions of the Public Health Acts of 1875 and 1936. It was not until the Rural District Councils (Urban Powers) Order, 1931, made under s. 25 of the Local Government Act, 1894, put s. 26 of the Public Health Act, 1875, into force throughout England and Wales as from July 22, 1931, that it was a statutory offence to build over a sewer or main in a rural district. If the local authority, in whom the sewer or main was vested, wished to prevent such building, or to have it removed when built, they had no special statutory remedy, but would have had to go to the proper Court for relief. I do not doubt that in a proper case they would have obtained a mandatory order. By s. 26 of the Act of 1875 any person who in an urban district, without the consent of the urban authority, caused any building to be newly erected over a sewer of the urban authority was liable to forfeit to the urban authority a certain sum, and, further, the urban authority was authorized itself to pull down the offending building and to recover in a summary manner from the offender any expenses incurred by them in doing so. It could not, I think, be argued that, if an urban authority had preferred not to perform the work of demolition, with the possible risk of exceeding their statutory powers, and accordingly had gone to the Court for relief, the Court could not and would not in its discretion have made a mandatory order if the circumstances justified it. The same considerations necessarily apply to a rural district council after the coming into force of the Order of 1931 to which I have referred.

The Act of 1936, which came into force on October 1, 1937 (that is, after the main here in question had been laid and the houses built over it), made an alteration in the law. It provides by s. 25, sub-s. 1, that where plans of a building are in accordance with building by-laws deposited with a local authority, and it is proposed to erect the building over any sewer or drain which is shown on the map of sewers required by Part II. of the Act to be kept deposited at the offices of the authority, the authority shall reject the plans unless they are satisfied that in the circumstances of the particular case they may properly consent to the erection. Sub-s. 3 provides that if before the commencement of the Act a building has been erected over a sewer without such consent (if any) as under s. 26 of the Public Health Act, 1875, was required at the date of the building, the local authority may by notice require the owner of the building to pull it down or to alter it in such manner as may be necessary; and, further, that the provisions of Part XII. of the Act with respect to appeals against, and the enforcement of, notices requiring the execution of works are to apply in relation to any notice given under this sub-section. This in effect provides for appeal against notices to a court of summary jurisdiction and gives that court wide powers of dealing with the situation in an equitable way.

It is sub-s. 3 on which the defendants rely. They contend that their houses were not built without the consent required under s. 26 of the Public Health Act, 1875, at the date of building, but that, if they were built without such consent, then the plaintiffs have their remedy under the sub-section and ought not to be granted any other relief.

In my judgment, however, the sub-section has no application to the present case. The defendants' houses were erected with the consent not of the plaintiffs but of the rural district council, which was no doubt for certain purposes the proper authority to give such consent but either did not know or did not care whether the building was over the line of the water main which was vested in the plaintiffs. The plaintiffs, whose concern it was whether the houses were built over their main, were not asked their consent.

It appears to me that there is, in fact, a gap in the Acts. Where a main is laid without the district of the local authority and it is desired to build a house over it, the builder does not appear to be required by the Act of 1875 to obtain the consent of that local authority. He must, without any reference to sewers or mains, submit his plans to the local authority within whose district he builds. He did so in this case, and no doubt the rural district council gave consideration to the matters which they were bound to consider, but without regard to the plaintiffs' rights and duties and without their knowledge. I have not had pointed out to me any provision, either in the old law or the new, which requires the local authority in whose district a house is built to consult or communicate with the local authority whose mains or sewers are built over. Sect. 26 of the Act of 1875 deals with the case of a person doing something in an urban district without the consent of the urban authority, and as extended by the Order of 1931 to a person doing something in a rural district without the consent of the rural authority. It appears to have overlooked the doing of something in a rural district without the consent of the urban authority who will be affected by the Order. This being the position, it seems that it cannot be predicated of the houses now in question that they were erected over the main " without "such consent, if any, as under s. 26 of the Public Health

"Act, 1875, was required at the date of the erection of the "building," for that can only refer to the case where the section requires the consent and the buildings are, in disregard of the statute, built without it. It was urged that this interpretation does not give effect to the words " if any " and that section is applicable where no consent of the local authority was required. This is not, in my judgment, the true meaning of the section. The words " if any " are inserted just because before the Order of 1931 no question of consent arose in a rural district. They cannot, in my judgment, have the effect for which the defendants contend.

It follows that the plaintiffs cannot avail themselves of the statutory remedy provided by s. 25 of the Public Health Act, 1936, and it is unnecessary for me to consider the difficult question whether or not, if they could, that remedy is exhaustive and excludes them from any other relief to which they might otherwise be entitled.

I am unable, then, to accept any of the defendants' pleas and must give the plaintiffs the relief which they claim. I am reluctant to make, as the plaintiffs themselves were reluctant to ask for, a mandatory order, but I see no real alternative. It would not be right to leave matters as they are with a mere declaration of rights. The plaintiffs have duties the neglect of which might have serious consequencies for a number of people. They may at some near or some distant time find it necessary to inspect or repair their main where it lies under the defendants' houses. They could only do so, as matters now stand, by breaking through the floors and foundations of the houses or tunnelling under them. This is not, as I have already said, a burden which ought to be put on them. But apart from that it is at least possible that the occupants might, at a time when this contest has been forgotten, strenuously object to the plaintiffs exercising their rights in a manner gravely interfering with their comfort and, on one side or the other, an appeal to force might be made. Force is the sanction of the law, but its exercise must be invoked by process of law. It is, I think, my duty now to make an order which will avert this possibility of further dispute. I must

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accordingly make a mandatory order in the terms of the claim, but will postpone its operation for a year. The defendants must pay the costs of the action.

Solicitors: *Sharpe, Pritchard & Co., for W. C. Croasdell, Town Clerk, Abingdon; Preston, Lane-Claypon & O'Kelly, for Andrew Walsh & Son, Oxford.*

H. L. L.

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# *In re* WELSH CHURCH ACTS, 1914 AND 1919.

# *In re* TITHE ACT, 1936.

# COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES

*v.*

# REPRESENTATIVE BODY OF CHURCH IN WALES AND TITHE REDEMPTION COMMISSION.

[1939. W. 3475.]

*Ecclesiastical law—Church in Wales—Vesting of tithe rentcharges in Commissioners of Church Temporalities in Wales—Tithe rentcharges transferable by Commissioners to county council—Transfer postponed under statutory power—Liability to repair chancel—"Lay impropriator"—Welsh Church Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *ss.* 3, 4; *s.* 8, *sub-s.* 1 (*c*); *s.* 28—*Tithe Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *s.* 1; *s.* 4, *sub-s.* 2 (*a*); *s.* 31, *sub-ss.* 1, 2; *Sch.* 7.

By s. 28, sub-s. 1, of the Welsh Church Act, 1914: "Nothing "in this Act shall affect any liability to pay tithe rentcharge, or "the liability of any lay impropriator of any tithe rentcharge to "repair any ecclesiastical building, but a county council shall not, "by reason of being entitled to or receiving any tithe rentcharge "under this Act, be liable for the repair of any ecclesiastical "building."

On March 31, 1920, the date of disestablishment, tithe rentcharge belonging to the rector of a parish in Wales vested, by virtue of s. 4, sub-s. 1 (*b*), of the Welsh Church Act, 1914, in the Commissioners of Church Temporalities in Wales and, by virtue of s. 8, sub-s. 1 (*c*), of the Act, became transferable by them to the Carmarthen County Council. Under a power in s. 4, sub-s. 1, of the Welsh Church (Temporalities) Act, 1919, they postponed the transfer and had not carried it out on October 2, 1936, the date, under the Tithe Act, 1936, for the extinguishment of tithe rentcharge.

On a summons by the Commissioners of Church Temporalities in Wales (the Welsh Commissioners) to which the Representative Body of the Church in Wales (the Representative Body) and the Tithe Redemption Commission were defendants, to determine (1.) whether or not the liability to repair the chancel of the church, formerly attaching to the tithe rentcharge which before March 31, 1920, belonged to its rectory but which on that date by virtue of s. 4 of the Welsh Church Act, 1914, vested in the plaintiffs, and by virtue of s. 8, sub-s. 1 (*c*), of the Act became transferable by them to Carmarthen County Council, had, before October 2, 1936, by virtue of s. 28 of the Act or otherwise by virtue of the Welsh Church Acts, 1914 and 1919, ceased to attach to the tithe rentcharge, and whether or not the tithe rentcharge had, before October 2, 1936, so ceased to be subject to that liability within the meaning of para. 1 (*b*) of Part I. of the Seventh Schedule to the Tithe Act, 1936; (2.) whether or not the Representative Body were, by reason of the provisions of the Welsh Church Acts, 1914 and 1919, precluded from receiving, pursuant to the Tithe Act, 1936, part of the redemption stock to be issued by the Tithe Redemption Commission for compensation in respect of the extinguishment of the rentcharge by that Act on October 2, 1936:—

*Held*, that the plaintiffs were "lay impropriators" within the meaning of s. 28 of the Act of 1914, and thereunder liable for the repair of the chancel, notwithstanding that the county council, because the tithe rentcharge had not been transferred to it before October 2, 1936, would receive only part of the redemption stock to be issued for compensation, the rest of it going to the Representative Body.

*Wickhambrook Parochial Church Council* v. *Croxford* [1935] 2 K. B. 417, considered.

ADJOURNED SUMMONS.

This summons was issued by the Commissioners of Church Temporalities in Wales (hereinafter called "the plaintiffs") to determine, on a test case, the effect of the Welsh Church Acts, 1914 and 1919, on liability to repair chancels of churches in Wales. The defendants were the Representative Body of the Church in Wales (hereinafter called "the Representative "Body") and the Tithe Redemption Commission. The plaintiffs were a statutory corporation created by s. 10 of the Act of 1914, and the Representative Body were incorporated by Royal Charter pursuant to s. 13 of the Act.

The question for decision was whether, immediately before October 2, 1936, the plaintiffs were liable to repair the chancel of the parish church of Llanglydwen, Carmarthen, in the diocese of St. David's. At all material times the whole of the tithe issuing out of lands in the parish commuted and apportioned under the Acts for the commutation of tithes consisted of tithe rentcharges of an aggregate annual amount of 100*l.* (hereinafter called "the tithe rentcharge") belonging and payable to the rector as parochial incumbent. At all times since the commutation and before March 31, 1920, the tithe rentcharges so belonged and were payable to him.

At no time before March 31, 1920, was there belonging to or appropriated to the use of the rectory or to the rector as such any fund or endowment specially allocated to the repair, restoration, or improvement of the fabric of any church or other ecclesiastical building in the parish. On March 31, 1920, by virtue of s. 4 of the Act of 1914, they vested in the plaintiffs (1), and by s. 8, sub-s. 1 (*c*), of that Act they became transferable by the plaintiffs to Carmarthen County Council. (2)

Sect. 1 of the Act of 1914, as amended by the Statute Law Revision Act, 1927, provides that, on the date of disestablishment (later fixed by the Act of 1919 as March 31, 1920) the Church in Wales shall cease to be established by law.

Sect. 4, sub-s. 1, of the Act of 1919 (the Welsh Church (Temporalities) Act) empowers the plaintiffs to postpone any transfer ordered by the Act of 1914 except to the Representative Body. (3)

Sect. 1 of the Tithe Act, 1936, provides that, subject to the

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(1) Sect. 4, sub-s. 1: "As from "the date of disestablishment "there shall, save as by this "section provided, vest in the "Welsh Commissioners hereinafter "mentioned" (i.e., the plaintiffs) "(*a*) all property vested in the "Ecclesiastical Commissioners or "Queen Anne's Bounty, which is "ascertained as hereinafter mentioned to be Welsh ecclesiastical "property; and (*b*) all property "not so vested, and not consisting "of charges on the common fund "of the Ecclesiastical Commissioners, which, at the passing of "this Act, belongs to or is appropriated to the use of any "ecclesiastical office or cathedral "corporation in the Church in "Wales, or the holder of any such "office as such; subject, in the "case of all such property, to all "tenancies, charges, and incumbrances, and to all rights and "interests saved by this Act, "affecting the property."

(2) Sect. 8, sub-s. 1: "Subject "to the provisions of this Act, the "Welsh Commissioners shall by "order transfer the property "vested in them by this Act, as "follows: (*a*) they shall transfer "to the representative body (i.) all "churches; . . . . (iii.) all "funds or endowments specially "allocated to the repair, restoration, or improvement of the "fabric of any such church or "ecclesiastical residence . . . . "(*c*) of the property not so transferred to the representative body "they shall transfer any tithe "rentcharge which was formerly "appropriated to the use of any "parochial benefice to the council "of the county in which the land "out of which the tithe rentcharge "issues is situate."

(3) Sect. 4, sub-s. 1: "The "Welsh Commissioners may postpone the transfer under the "Welsh Church Act, 1914, of any "property vested in them to any

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provisions of the Act, all tithe rentcharge shall be extinguished on October 2, 1936. Sect. 2, sub-s. 1, provides for the issue of stock, to be called "redemption stock," to be "charged by "way of guarantee on the Consolidated Fund and the growing "produce thereof . . . . for the compensation of the persons "interested in a tithe rentcharge in respect of the extinguishment thereof by this Act."

Sect. 4, sub-s. 2, lays down certain duties of the Tithe Redemption Commission, and s. 31, sub-s. 1, deals with the liability to repair chancels. (1) In the present case, the "Diocesan Authority" referred to in s. 31, sub-s. 2, was the Representative Body.

The plaintiffs, under the powers conferred on them by

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"person or body of persons . . . . "other than the representative "body, and such person or body "of persons shall not be bound to "accept the transfer of any such "property until the Secretary of "State so directs; and so long as "any tithe rentcharge which was "previously attached to a benefice "remains vested in the Welsh "Commissioners, the Welsh Commissioners shall be deemed to be "the owners of a tithe rentcharge "attached to a benefice for the "purposes of the Tithe Rentcharge (Rates) Act, 1899."

(1) Sect. 4, sub-s. 2: "It shall "be the duty of the Commission, ". . . . (*a*) to determine what "tithe rentcharges have been extinguished by this Act, the "amount of stock to be issued for "compensation in respect of the "extinguishment thereof, and the "persons entitled to receive the "stock to be so issued; . . . . "and to perform such other functions for the purposes of this "Act as are hereafter in this Act "mentioned."

Sect. 31, sub-s. 1: "The provisions of this section shall have "effect with respect to liabilities "to repair chancels of churches or "other ecclesiastical buildings "arising from the ownership of "(*a*) tithe rentcharge extinguished "by this Act in respect of which "stock is to be issued under this "Act; . . . ."

Sub-s. 2: "In respect of a "liability to repair arising from "the ownership of a tithe rentcharge extinguished by this Act "in respect of which stock is to "be issued under this Act, the "Diocesan Authority shall be "entitled to receive a part of the "stock to be issued in respect of "the rentcharge equal in amount "to such a sum (in this section and "in the Seventh Schedule to this "Act referred to as 'the sum "'required for repairs') as may "be reasonably sufficient, having "regard to the condition of the "chancel or building at the appointed day, to provide for the "cost of future repairs thereof, "and to provide a capital sum the "income of which will be sufficient to insure it for a sum "adequate to reinstate it in the "event of its being destroyed by "fire . . . ."

s. 4, sub-s. 1, of the Act of 1919, postponed transfer of the tithe rentcharges to the county council and the tithe rentcharges were vested in them until October 2, 1936.

The summons asked (i.) whether the liability to repair the chancel of the church had, before October 2, 1936, by virtue of s. 28, or otherwise by virtue of the Acts of 1914 and 1919, ceased to attach to the ownership of the tithe rentcharges and whether or not the rentcharges had before that date so ceased to be subject to that liability within the meaning of para. (1.) (*b*) of Part I. of the Seventh Schedule to the Tithe Act, 1936; and (ii.) whether or not the Representative Body was precluded by the Acts of 1914 and 1919 from receiving, pursuant to the Tithe Act, 1936, a part of the redemption stock to be issued by the Tithe Redemption Commission for compensation.

*C. S. Rewcastle K.C.*, *J. V. Nesbitt* (*Meyrick Beebee* with him) and *R. T. E. Latham* for the plaintiffs. It is arguable that the cessation of ecclesiastical law as law has destroyed the obligation to pay tithes. Certainly it has done away with personal liability for chancel repair.

Had s. 3 of the Act of 1914 stopped at sub-s. 1, by which the ecclesiastical law of the Church in Wales ceases to exist as law, and the Act contained nothing further on the subject, it would have been quite clear that liability for chancel repair was completely destroyed. Even as the Act stands, the only modification of its destruction is in s. 28. In that section the words "lay impropriator" are words of art. Not every holder of tithe rentcharge is a lay impropriator. At the time of the destruction of the monasteries, and thereafter by various Acts up to the time of William of Orange, large amounts of property including much tithe were taken away from the Church and given by the Crown to various persons. These persons were the first lay impropriators, and nobody except direct successors in title to them can be lay impropriators.

In the expression "nothing in this Act shall affect," the word "affect" is used only in relation to something existing at the time of the coming into force of the Act, not in relation to something which, by reason of the provisions of the Act, has come into existence thereafter. On that basis, the words "any lay impropriator" would still be confined to any lay impropriator in existence at the date of the coming into force of the Act of 1914. Thus, except for the saving in relation to lay impropriators effected by s. 28, sub-s. 1, the liability is gone. [They referred to s. 8, sub-s. 2.]

This particular liability is abolished by s. 3, sub-s. 1. It is recreated in respect of some property but, because of s. 28, not in respect of property transferred to county councils. In s. 28, sub-s. 1, the antithesis between "entitled to" and "receive" is to be noted. Undoubtedly, when a county council is receiving tithe rentcharge, liability for chancel repair is gone. Therefore the words "entitled to" must refer to the interim period during which, having vested in them under s. 4 this particular tithe rentcharge was lodged in the plaintiffs' keeping. [They referred to Halsbury's Laws of England, 2nd ed., vol. xi., para. 1706, p. 956; *Portland (Duke)* v. *Bingham* (1); Grove's Alienated Tithes, Part 3, p. 654; and Phillimore's Ecclesiastical Law, 2nd ed., vol. i., p. 219.]

The plaintiffs must establish that this liability for chancel repair was purely personal to the owner of the property, and that it arose and was enforceable only under ecclesiastical law. *Morley* v. *Leacroft* (2); *Hauxton Parochial Church Council* v. *Stevens* (3); *Wickhambrook Parochial Church Council* v. *Croxford.* (4)

*R. F. Roxburgh K.C.*, *W. S. Wigglesworth*, and *David Pennant* (absent on war service) for the Representative Body. At the date of disestablishment the spiritual rector was liable to repair the chancel, because he received the tithe rentcharge.

In the *Wickhambrook* case (4) the liability was not limited by the acknowledgment of the amounts received or receivable. It is relevant to the construction of the Act that the liability, whether it attaches to the beneficial owner or not, certainly attaches to the legal owner.

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(1) (1792) 1 Hag. Con. 157, 162.
(2) [1896] P. 92.
(3) [1929] P. 240.
(4) [1935] 2 K. B. 417.

The liability for chancel repair was part, not of ecclesiastical law, but of the common law. The position was curiously anomalous, because the Court to enforce the liability was the ecclesiastical court, and the ultimate sanction was the High Court.

The Representative Body contends, first, that in the circumstances the plaintiffs became liable for chancel repairs because they are made so by the Acts of 1914 and 1919: and, secondly, that, assuming that contention to be wrong, the plaintiffs are liable because, apart from the Acts, they became or would have become liable at common law and there is nothing in the Acts exempting them, either expressly or by implication, from liability.

Sect. 4, sub-s. 1 (*b*), vests the property in the plaintiffs as from the date of disestablishment.

It will not be disputed that the words saved by the Act refer only to the rights and interests, and not to the tenancies, charges and incumbrances. On that footing, if this liability is a charge or incumbrance, the Representative Body's point is gained; but the *Wickhambrook* case (1) makes it difficult to contend that it is a charge or incumbrance because, if the obligation is not correlated to the quantum, it is a charge or incumbrance of an unusual kind. However, s. 28, sub-s. 2, of the Act can be invoked in support of the contention that it is. (2)

In considering whether this liability is a right affecting property, para. 1 (*a*) of Part I. of the Seventh Schedule to the Tithe Act, 1936, is relevant. (3) Clearly the Legislature, when passing this Act, thought that it was. In any case

(1) [1935] 2 K. B. 417.

(2) Sub-s. 2: "Such liability as "aforesaid of a lay impropriator "may be enforced in the temporal "courts at the instance of the "representative body in like manner "as if such liability arose "under a covenant made with the "representative body and running "with the tithe rentcharge."

(3) Para. 1 (*a*): "The Commission shall ascertain in relation "to every chancel or other ecclesiastical building for the repair of "which liability attached to the "ownership of tithe rentcharge "agreed or awarded on the original commutation of tithes "under the Tithe Acts—(*a*) the "rentcharges in respect of which "such liability attached, and the "aggregate amount of those rentcharges;"

s. 28 by itself is enough for the Representative Body. It is quite plainly not limited to those who were lay impropriators before the Act. The section saves the liability.

On the meaning of " lay impropriator " see Termes de la Ley, p. 26; Leach on Tithes, 6th ed., p. 6, note on s. 12 of the Tithe Act, 1836; Ayliffe's Parergon of English Canon Law, p. 90.

The argument that s. 3 of the Welsh Church Act, 1914, abolishes all obligations to repair chancels and that another provision re-creates them is wrong, both as a matter of construction and as giving a quite absurd result: and even assuming it to be right, s. 28 would nullify any such effect of s. 3. [They referred to s. 13, sub-s. 2 (1), Gibson's Codex of Ecclesiastical Law, vol. i., p. 199; *Pense* v. *Prouse* (2); *Smallbones* v. *Edney* (3); *Griffin* v. *Dighton* (4); and Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1416.] Those authorities show that the obligation to repair chancels is part of the common law, and so is not aptly describable as ecclesiastical law.

*H. O. Danckwerts* for the Tithe Redemption Commission. The Tithe Redemption Commission apprehend that the decision in this case will be of great guidance to them.

*C. S. Rewcastle K.C.* in reply. The expression " common "law" has many meanings. In ecclesiastical law it is equivalent to natural justice. It means also the common law of all Christendom, and the common law of England. The common law of Christendom is very ready to accept modification of itself by local custom which is sometimes local in the real sense of being limited to a very small neighbourhood, and is sometimes over large areas. There is no sanction, ultimate or other, to enforce this obligation to repair chancels.

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(1) Sect. 13, sub-s. 2: " If at "any time it is shown to the "satisfaction of His Majesty the "King that the said bishops, "clergy and laity have appointed "any persons to represent them, "and hold property for any of "their uses and purposes, His "Majesty in Council may by "charter incorporate such persons "(in this Act referred to as the "representative body), with power "to hold land without licence in "mortmain."

(2) (1695) 1 Ld. Raym. 59.

(3) (1870) L. R. 3 P. C. 444, 450.

(4) (1864) 5 B. & S. 93.

[He referred to Watson's Clergyman's Law, pp. 388, 394, 397 ; Maitland's Canon Law in the Church of England, p. 4 ; *Evers and Owen's* case (1) ; *The Queen* v. *Millis* (2) ; Godolphin's Repertorium Canonicum, p. 130 ; Chancel Repairs Act, 1932, s. 1. (3)]

Grove's Alienated Tithes contains a complete list of all the tithes which the plaintiffs say are impropriations.

There has been no litigation with regard to this point.

MORTON J. [stated some of the facts, read ss. 10 and 13 of the Act of 1914, and s. 4, sub-s. 1, of the Tithe Act, 1936, and continued :] The contest on this summons, which is no doubt a friendly contest between two representative bodies, arises between the plaintiffs and the Representative Body of the Church in Wales. The Tithe Redemption Commission does not take sides in the matter, and Mr. Danckwerts has addressed no argument to me on its behalf.

The two questions raised by the summons are closely linked together, and are : [His Lordship read them, and continued :] Stating the matter more shortly, I have to decide whether immediately before October 2, 1936, the plaintiffs were, or were not, liable to repair the chancel of the parish church of Llanglydwen. If, as they say, they were not so liable, they are entitled to receive the whole of the redemption stock mentioned in the first question. If the plaintiffs were so liable, I think it must follow, on the true construction of the Tithe Act, 1936, that the Representative Body is entitled to receive a part of that stock.

I am told that this is a test case and that the decision of this case will, or may, govern many other cases and determine the ownership of very large sums of stock.

I have felt considerable doubt in the course of the argument

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(1) (1628) Godb. 431, 432.

(2) (1844) 10 Cl. & F. 534, 617.

(3) Sect. 1 : "After the commencement of this Act no proceedings to enforce liability to repair a chancel shall be brought in any ecclesiastical court, and any such proceedings as aforesaid which, but for the provisions of this Act, could only have been brought in an ecclesiastical court, shall be brought under and in accordance with the provisions of this Act."

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of Mr. Rewcastle, for the plaintiffs, and of Mr. Roxburgh and Mr. Wigglesworth, for the Representative Body, but as I have arrived at a definite conclusion, based on reasons which I hope can be stated quite simply, I think it unnecessary to reserve my judgment.

The facts in the case are not in dispute, and they are as follows: [His Lordship stated them, read s. 1 of the Act of 1914, as amended by the Statute Law Revision Act, 1927, s. 4, sub-s. 1, and s. 8, sub-s. 1 (*a*) (i.), (iii.), (*b*) and (*c*), of the Act of 1914, and continued:] I do not think I need read for the moment the rest of that section, but, turning to the part which I have read, it provides that the plaintiffs shall transfer—it is imperative—the tithe rentcharge to the county council of Carmarthen. No date is stated for such transfer. Sect. 10, sub-s. 7, provides: "The powers of the Commissioners shall continue until the end of the year in which "this Act is passed and for three years thereafter, and no "longer, and the Commissioners shall then be dissolved; but "it shall be lawful for His Majesty from time to time with "the advice of His Privy Council, on the application of the "Commissioners, to suspend the dissolution of the Commissioners and, subject to revision by the Treasury of the "salaries of the Commissioners and the remuneration and "number of their officers, to continue their powers for such "time, not exceeding in the aggregate two years, as His "Majesty thinks fit." From that sub-section it appears that, at the time when the Act was passed, it was not thought likely that the discharge of their duties by the Commissioners, including the transfer of the various properties to the parties who were ultimately to receive them, would take a very long time, but I must now explain why the plaintiffs have not yet been dissolved, and why, as is the fact, the tithe rentcharge has not yet been transferred to the county council of Carmarthen. It is enacted by s. 1 of the Welsh Church (Temporalities) Act, 1919: "(1.) His Majesty in Council may, "from time to time, on the application of the Welsh Commissioners appointed under the Welsh Church Act, 1914, "suspend the dissolution of the said Commissioners, and, "subject to revision by the Treasury of the salaries of the "said Commissioners and the remuneration and number of "their officers, continue their powers for such time as His "Majesty thinks fit," and by s. 4, sub-s. 1, of the same Act it is enacted: [His Lordship read it, and continued:] The plaintiffs were duly appointed pursuant to s. 10, sub-s. 1, of the Act of 1914. Their dissolution has been duly suspended, and is now suspended, and their powers have been duly continued, and do now continue, by virtue of an order of His Majesty in Council under s. 1, sub-s. 1, of the Act of 1919. Thus the tithe rentcharge vested on March 31, 1920, in the plaintiffs by virtue of s. 4 of the Act of 1919, and they were bound to transfer it to the county council by virtue of s. 8, sub-s. 1 (*c*), of the Act of 1914.

I must now turn to certain portions of the Tithe Act, 1936. [His Lordship read s. 1, s. 2, sub-s. 1, s. 4, sub-s. 2, and s. 31, sub-ss. 1 and 2, and continued:] The body referred to in this sub-section as the "Diocesan Authority" is, in the case of the tithe rentcharge which I am considering, the first defendant, the Representative Body; that is so by reason of Part III. of the Seventh Schedule to the Tithe Act, 1936, which is in the following terms: "Modifications as to Wales "and Monmouthshire. (1.) For references to the Diocesan "Authority or to Queen Anne's Bounty there shall be sub-"stituted references to the Representative Body incorporated "under Section 13 of the Welsh Church Act, 1914." The result is that, if the plaintiffs were liable to repair the chancel immediately before October 2, 1936, it would appear that a substantial portion of the redemption stock which is to be issued under the Act would be issued to the Representative Body, and the county council of Carmarthen would be deprived of that stock; and it is noteworthy that the sum referred to as "the sum required for repairs" must be sufficient to provide the cost of future repairs of the chancel, I suppose in perpetuity, and to provide a capital sum which would be sufficient by the income thereof to insure the chancel "for a sum adequate to reinstate it in the event of its being "destroyed by fire." So it is plain that the decision of this question is one of considerable importance to the parties. Sect. 31, sub-s. 5, of the Tithe Act, 1936, is: "The foregoing "provisions of this section shall have effect subject to the "provisions of Part I. of the Seventh Schedule to this Act, "which relate to the apportionment of liability to repair in "certain cases." Sub-s. 8 provides: "This section and the "Seventh Schedule to this Act shall have effect in relation to "a chancel or building in Wales or Monmouthshire subject to "the modifications specified in Part III. of that Schedule." To these modifications I have already referred, the modification which is material for the purpose of this case being that, for "references to the Diocesan Authority," I must substitute "references to the Representative Body."

I must now turn to Part I. of the Seventh Schedule, to which I am referred by s. 31, sub-s. 5. Para. 1 of Part I. of the Seventh Schedule is as follows: [His Lordship read it, down to and including (*a*), and continued:] "(*b*) which, if "any, of those rentcharges was or were redeemed under the "Tithe Acts or ceased before the appointed day to be subject "to such liability, and the amount, or the aggregate amount, "as the case may be, of any such rentcharges; and (*c*) the "identity and the aggregate amount (in this Part referred "to as 'the apportionable amount of rentcharge liability') of "the residue of those rentcharges." The language of this part of the schedule does not appear to be altogether consistent, because in the earlier portion of it reference is made to the "liability attached to the ownership of tithe rent-"charge" which is, I think, on the authority of a case to which I shall presently refer, an accurate description of the liability, whereas in sub-cl. (*b*) reference is made to the rentcharges themselves ceasing to be "subject to such liability." However, I do not think any real importance, for the purpose of this case, can be attached to that variation of language. I think that sub-cl. (*b*) is merely referring to rentcharges the owners whereof ceased to be liable to carry out the repairs. Part I. of the Third Schedule to the Tithe Act, 1936, provides that "stock to be issued for compensation in respect of the extin-"guishment of a tithe rentcharge shall be issued . . . . in "the case of a rentcharge which immediately before its "extinguishment was vested" in the plaintiffs, to the plaintiffs.

I have already pointed out that, if, immediately before October 2, 1936, the plaintiffs were liable, as legal owners of the tithe rentcharge, to repair the chancel, part of the stock to be issued in respect of the extinguishment of the tithe rentcharge must be issued to the Representative Body. I have now to consider, were the plaintiffs, immediately before October 2, 1936, liable to repair the chancel, or were they not?

There are three points in this difficult case which seem to me to be quite clear. First of all, as I have said, immediately before October 2, 1936, the plaintiffs were the legal owners of the tithe rentcharge. This plainly appears from the facts as I have stated them. Secondly, apart from any statutory provision to the contrary, they would, as such legal owners, immediately before October 2, 1936, be liable to repair the chancel. If authority is needed for this proposition, it will be found in the case of *Wickhambrook Parochial Church Council* v. *Croxford*. (1) Thirdly, if there is any statutory provision relieving the plaintiffs from the liability to repair the chancel, it must, I think, be found in the Welsh Church Act, 1914. It is not suggested by counsel that it can be found in any other Act.

I now turn back to the Act of 1914 to see if I can find any such provision. Mr. Rewcastle says it is to be found in s. 3, which I must now read. Sub-s. 1 is: "As from the date of "disestablishment ecclesiastical courts and persons in Wales "and Monmouthshire shall cease to exercise any jurisdiction, "and the ecclesiastical law of the Church in Wales shall cease "to exist as law." Sub-s. 2 is: "As from the same date "the then existing ecclesiastical law and the then existing "articles, doctrines, rites, rules, discipline, and ordinances of "the Church of England shall, with and subject to such "modification or alteration, if any, as after the passing of "this Act may be duly made therein, according to the constitution and regulations for the time being of the Church "in Wales, be binding on the members for the time being of

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"the Church in Wales in the same manner as if they had "mutually agreed to be so bound, and shall be capable of "being enforced in the temporal courts in relation to any "property which by virtue of this Act is held on behalf of the "said Church or any members thereof, in the same manner "and to the same extent as if such property had been "expressly assured upon trust to be held on behalf of persons "who should be so bound." Mr. Rewcastle says that this section destroyed the liability to repair the chancel as from the date of disestablishment. He relies upon the whole of sub-s. 1 and says that these words extinguish any liability which would otherwise have rested on the plaintiffs by virtue of their ownership of the tithe rentcharge, an ownership which was (as appears from the sections which I have read) vested in them by this same Act. Mr. Roxburgh's reply to this is threefold. First of all, he says that s. 3, on its true construction, does not operate to extinguish the liability at all. It does not apply to this particular liability. Secondly, he says that the liability, even if it would otherwise have been extinguished by s. 3, is expressly preserved by s. 4, which vested the tithe rentcharge in the plaintiffs, " subject . . . . "to all tenancies, charges, and incumbrances, and to all "rights and interests saved by this Act, affecting the property." Thirdly, Mr. Roxburgh says that a general provision in s. 28 of the Act makes it plain that nothing in the whole of this Act can affect the liability to repair the chancel, which, in the absence of any statutory provision, would rest upon the plaintiffs as owners of the tithe rentcharge. As regards Mr. Roxburgh's first contention, I cannot put on s. 3, sub-s. 1, so limited a construction as that which he invites me to put upon it. Much of the argument has turned on the question whether the liability to repair the chancel is, or is not, part of the ecclesiastical law of the Church in Wales mentioned in s. 3, sub-s. 1. I have been referred to a long and very interesting series of authorities, ranging over some hundreds of years. I do not propose to deal with those authorities in detail, for reasons which will appear hereafter, nor do I propose to discuss, for the same reasons, the precise scope and effect of

s. 3, sub-s. 2. But as the matter has been very fully argued, I think I ought to express the view which I hold that Mr. Rewcastle's contention on this part of the case is correct. The authorities which have been cited to me satisfy me that the liability to repair the chancel is properly described as part of the ecclesiastical law of the Church in Wales within the meaning of s. 3, sub-s. 1, and apart from any other provisions which may appear in the Act, it would seem that the liability to repair the chancel would be destroyed by that sub-section. With regard to Mr. Roxburgh's second point, he did not contend before me that the liability to repair the chancel could be a tenancy, charge, or incumbrance within the meaning of s. 4, sub-s. 1. He stated—and I think rightly—that he was precluded from putting forward that argument in this Court by reason of the *Wickhambrook* case (1), to which I have already referred, but he desired to keep the point open if, as I gather is likely, this case goes to the House of Lords. He contended, however, that the liability to repair the chancel was covered by the words, "all rights and "interests saved by this Act, affecting the property." For reasons, which again will appear hereafter, I do not think it is necessary for me to discuss that argument in detail. I shall only say that I think there would be certain difficulties in holding that the liability to repair the chancel is a right or interest affecting the property, in view of the decision in the *Wickhambrook* case. (1)

It is to be observed that the nature of the liability was held in the *Wickhambrook* case (1) to be personal, and before the passing of the Chancel Repairs Act, 1932, the appropriate procedure for compelling a person liable to repair the chancel to carry out his duty was to seek to have him admonished by the appropriate ecclesiastical court in a cause of office promoted against him in that court. That being the nature of the liability at the time of the passing of the Act of 1914, and at the date of disestablishment, I think there are certain difficulties in coming to the conclusion that this liability is a right or interest affecting the property, whether

(1) [1935] 2 K. B. 417.

it is or is not a right or interest saved by the Act. On that part of the case I have formed no concluded opinion, nor is it necessary for me to do so, having regard to the view which I take of s. 28 of this Act.

I pass now to Mr. Roxburgh's third argument, which, if it is correct, is very far-reaching indeed. He contends, as I have said, that s. 28 has the effect that nothing in this Act affects the liability which, in the absence of any statutory provision, attaches to the plaintiffs as owners of the tithe rentcharge. Sect. 28 is in the following terms: [His Lordship read it, and continued:] Before I consider the effect of this section, I think I ought to read s. 8, sub-s. 2, which I omitted to read when I read the provisions as to the transfer of the property in s. 8. I read it for the purpose of seeing whether at this stage it throws any light on the problem which I have to determine. Sect. 8, sub-s. 2, is: "Save as otherwise "provided by this Act, all property transferred under this "section"—I pause there to say that the section provides for the transfer of the whole of the property vested in the plaintiffs by the Act—"shall be held subject to all existing "public and private rights with respect thereto." The word "existing" is defined in s. 38 of the same Act as follows: "The expression 'existing' means existing at the passing of "this Act." Then the sub-section continues: "and all "tenancies, charges, and incumbrances which may at the date "of transfer be subsisting therein, and in the case of all such "property, except tithe rentcharge transferred to a county "council, to the existing interests of all persons who at the "passing of this Act hold ecclesiastical offices in the Church "in Wales, and in the case of such tithe rentcharge to the "obligation to make such provision as is hereinafter mentioned "in lieu of such existing interests." A good deal of argument has taken place as to this sub-section, and I think that each side, to some extent, relies upon the sub-section as promoting its own cause, but it is to be observed that the sub-section, whatever may be its true construction in other respects, refers to the position after the property has been transferred to those who are ultimately to take it. For my part, although

I have considered the sub-section with great care, and have read it many times, I do not find that it is of any real assistance in the problem which I have to determine, which deals with the period, still subsisting on October 2, 1936, when this tithe rentcharge remained vested in the plaintiffs, and had not yet been transferred to the county council.

With regard to s. 28, to which I must now return, Mr. Rewcastle contends that the words "lay impropriator" in this section are words of art. Not every lay person, he says, who owns tithe rentcharge is a lay impropriator; the words only refer to the direct successors in title of persons who acquired the tithe, afterwards tithe rentcharge, by impropriation resulting from Royal grants made by various statutes from the dissolution of the Monasteries by Henry VIII. until the time of William of Orange. He specifies the lay impropriators to whom these words refer more particularly by referring me to a list in Grove's Alienated Tithes which begins at page 654 of that work, and he says that on the true construction of s. 28, sub-s. 1, "lay impropriator" has that very special meaning. Mr. Rewcastle says, secondly, that even if "lay impropriator" has a wider meaning than that, the scope of the section is limited to the state of affairs existing at the date of disestablishment, and refers only to lay impropriators who were properly described as such immediately before the date of disestablishment.

With regard to Mr. Rewcastle's first contention, I am satisfied that whatever may be the true significance of the words "lay impropriator" in certain contexts, they apply in this section to any lay person, or body of persons, owning a tithe rentcharge. Apart altogether from the wording of the remainder of the section, to which I shall shortly refer, it seems to me most unlikely that in this section the Legislature intended to draw any distinction between the lay impropriators described by Mr. Rewcastle and any other lay persons owning tithes. I think that the words "lay impropriator" are there used merely in contradistinction to "ecclesiastical appropriator," just as Romer L.J., as he then was, used these phrases in his judgment in the *Wickhambrook* case. (1) I can see no

(1) [1935] 2 K. B. 417, 440.

reason for treating the class of lay persons owning tithe rentcharges referred to by Mr. Rewcastle differently from any other lay persons owning tithe rentcharges. If, however, I felt any doubt upon this point, it would be removed by the words, " but a county council shall not, by reason of "being entitled to or receiving any tithe rentcharge under "this Act, be liable for the repair of any ecclesiastical building." These words seem to me to be quite unnecessary unless a county council owning tithes is a lay impropriator within the meaning of the section. Surely the Legislature is saying, in effect, that the liability of a lay impropriator is preserved, but it is desired—the word " but," I think, is of vital importance—to make an exception in the case of a county council which is entitled to or receives any tithe rentcharge under this Act. If this is so, it seems to me plain that the Legislature regards such a county council as being a lay impropriator within the meaning of the section, and if such a county council is a lay impropriator within the meaning of the section, it seems to me that the plaintiffs must also be a lay impropriator within the meaning of the section. It is not disputed that the plaintiffs are a lay body—in fact, there is a decision to that effect in the case of the *Commissioners of Church Temporalities in Wales* v. *Gustard* (1), and if it be said : " True, the plaintiffs are entitled to tithe "rentcharge and the county council will be entitled to tithe "rentcharge, but that is only by virtue of this same Act, "and it only takes effect, as regards the plaintiffs, at the date "of disestablishment, and, as regards the county council, at "a later date," I reply : " I can see no distinction between "the county council and the plaintiffs with regard to this "particular matter." If one of them is a lay impropriator—and I think it is reasonably clear from the section that the Legislature regarded the county council as a lay impropriator —then I think the plaintiffs must also be a lay impropriator within the meaning of the section.

These same words which I have read, " but a county "council," etc., also seem fatal to Mr. Rewcastle's second contention. If the section had been dealing only with bodies or persons who were lay impropriators immediately before the date of disestablishment, these words would have been quite unnecessary. I think it must follow from the passage introduced by the word "but" that the section is dealing with the liability of any lay impropriator at any time, and if one asks: "Are the plaintiffs, by reason of being entitled "to the tithe rentcharge immediately before October 2, 1936, "liable to repair the chancel?" I think this section has the effect of saying: "Well, you will find nothing in the Act of "1914 which affects their liability; if they are otherwise "liable, there is nothing in this Act which frees them from "the liability." I may observe finally with regard to s. 28 that the framers of the Act must, of course, have known, because the provisions are contained in the same Act, that the tithe rentcharge would successively vest in the plaintiffs and in the Carmarthen County Council. The Legislature has thought fit to insert an express exemption of the county council from liability to repair the chancel, and I think that is a strong indication that the plaintiffs were not intended to be exempted. Mr. Rewcastle suggests it is inconceivable that, as the county council is clearly exempted from this liability, the Legislature should have intended the plaintiffs to be subject to it. He described the plaintiffs as being a mere conduit pipe, through which the tithe rentcharge was ultimately to pass to the county council. I do not think the words "conduit pipe" is altogether an apt description, nor did Mr. Rewcastle suggest it was an exact description. The plaintiffs are not merely bare trustees during the period in which the tithe rentcharge is vested in them. They have certain important powers and duties during that period; for instance, by s. 9 they are directed to determine certain matters; by s. 11 they are given wide powers to decide certain questions; by s. 27 they are given certain powers of management and sale of the property vested in them; and by s. 30 they are given powers to borrow. It does not seem to me inconceivable that the plaintiffs were intended to be liable for the repair of the chancel, notwithstanding that the county council is expressly exempted from that liability. The Act itself suggests certain reasons why this should be so, and in particular Mr. Roxburgh referred me to s. 19 of the Act. Sect. 19, sub-s. 1 (*a*), is: "The property formerly "appropriated to the use of parochial benefices and transferred "to a county council shall be applied, in accordance with "one or more schemes made by that council either alone or "jointly with any other such council and approved by the "Secretary of State, to any charitable or eleemosynary purpose "of local or general utility, including the aiding of poor "scholars." Sub-s. 2 is: "In framing schemes under this "section as to the application of property formerly appro-"priated to the use of parochial benefices, due regard shall "be had to the wants and circumstances of the parish in "which the property is situate or from which it is or has "been derived, and of the parish comprising the ecclesiastical "parish to which any such property was attached, and "generally to the circumstances of each particular case." These provisions seem to me to supply (possibly there are other provisions which can be referred to) a special reason why the county council was exempted by the Legislature from the liability to repair the chancel: that which they receive is wholly dedicated, by the section which I have read, to other charitable purposes.

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(1) [1923] 1 K. B. 640, 649.

The view which I have formed as to the construction of s. 28 seems to make it unnecessary for me to examine in detail the provisions of any other section. Let me assume in favour of the plaintiffs that the liability of a tithe rentcharge owner to repair the chancel is part of the ecclesiastical law referred to in s. 3 (as, indeed, I think it is), and let me assume for that that this liability does not come within the words "subject . . . . to all tenancies, charges, and incum-"brances, and to all rights and interests saved by this Act, "affecting the property" (and I think it may well be that this assumption is also well founded), the plaintiffs still, in my view, remain under this liability because of the provisions of s. 28. I may add that in the course of the argument each side has drawn attention to certain difficulties which would arise if I accepted the argument of the other, and no doubt each side will again call attention to those difficulties if this case is considered by any other Court. For my part, I do not propose to discuss those difficulties in detail, although they have been argued with great skill and ingenuity.

It seems to me that s. 28, if I have construed it correctly, affords a safe anchorage in what I think I might fairly describe as a sea of doubt and difficulty. The result is that the plaintiffs, as owners of the tithe rentcharge, would be liable to repair the chancel immediately prior to October 2, 1936, unless some statutory provision relieves them of that liability. Sect. 28, as I read it, says that nothing in the 1914 Act is to affect that liability, and it is not suggested that there is any other Act which so relieves them.

There is one other observation which I desire to make as to the construction of the 1914 Act. Immediately before the date of disestablishment, the rector was liable to repair the chancel because he owned the tithe rentcharge. The 1914 Act deprived him of the tithe rentcharge, subject to certain provisions, to which I have not referred, for compensating him, and vested it in the plaintiffs. It is, of course, possible that the Act intended to give the property to the plaintiffs free from the liability to repair the chancel and thus to deprive the owners of the chancel of a very valuable right. It is also possible that while in effect vesting the tithe rentcharge in succession in the plaintiffs and in the county council, the Act intended to exempt both the plaintiffs and the county council from the liability to repair, but that seems unlikely, as there is an express exemption of the county council. Further, I would refer to the well known rule referred to by Bowen L.J. in *Hough* v. *Windus* (1) as the recognized rule "that statutes should be interpreted if possible so as to "respect vested rights." It is quite clear that the right of the owners of the church to require the chancel to be repaired is taken away in the case of the transfer to the county council, but it is not made clear to my mind by the Act that that right is taken away in the case of the plaintiffs. In fact, as

(1) (1884) 12 Q. B. D. 224, 237.

I have held, there are provisions which prevent that right from being taken away, but had there been any doubt in my mind, I think the rule referred to above might have been applied with force.

Mr. Rewcastle has pointed out, and it is quite true, to my mind, that the construction at which I have arrived has a very strange result, in this respect. The 1914 Act intended that ultimately the county council should get the tithe rentcharge free from any liability to repair the chancel. In the view which I take of this matter, the plaintiffs, as events have happened, had not ceased to be liable to repair the chancel before October 2, 1936, and, as a result of that, as I read the Act of 1936, a portion, which may be a substantial portion, of the redemption stock to be issued on the redemption of the tithe rentcharge, will go, not to the county council, but to the representative body. It will so go by reason, and by reason only, of the fact that the plaintiffs had not transferred the tithe rentcharge to the county council before October 2, 1936. By reason of that fact, if the argument for the Representative Body is right, as I have held it is, the county council will in effect be saddled with that very liability from which the Act of 1914 intended to free them, because a sum calculated with reference to the sum required for repairs will in fact be taken from the county council and given to the Representative Body. I entirely agree with Mr. Rewcastle's submission that that is a strange result, but, on the view I take of the construction of the Act of 1914, I think it is a result which necessarily follows from the language used in the Tithe Act, 1936. Whether or not it is a result which was foreseen by the framers of that statute, I do not know; but it is a result which seems to me to follow from the language which has been used, and I must leave it at that.

For these reasons I answer questions 1 and 2 of the originating summons in the negative, and I shall make declarations accordingly.

Solicitors: *A. H. R. Primrose; Milles, Jennings White & Foster; Official Solicitor, Ministry of Agriculture and Fisheries.*

K. R. A. H.

# *In re* LUCK'S SETTLEMENT TRUSTS.

FARWELL J.

1940

Jan. 12, 16, 26.

# *In re* LUCK'S WILL TRUSTS.

# WALKER *v.* LUCK.

[1939 L. 1352.]

*Legitimacy—Child born in California—Born out of wedlock—Father a British subject—Californian domicil subsequently acquired by father—Legitimation by declaration according to Californian law—Whether child entitled to take under trusts of English settlement.*

In 1906 a British subject, who was then married, became the father of an illegitimate son born in California, where he was then resident. He subsequently became domiciled there and in 1922 contracted a second marriage with a woman not the mother of his son, his previous marriage having been dissolved. In 1925 he signed a declaration, which in Californian law operated to legitimate the son, to the effect that he publicly acknowledged the child as his, that he had received him into his home with the consent of his wife, that he had in all respects treated him as if he were legitimate and that he thereby adopted him as such. After the death of his father in 1938 the son claimed to share in the funds settled respectively by the marriage settlement of his grandparents, the survivor of whom had died in 1898, and under the will of his grandfather, both documents taking effect according to English law. Under the marriage settlement and an appointment made thereunder the share settled on each of the children of the grandparents was ultimately divisible among all the children of that child born within twenty-one years after the death of the survivor of them and under the trusts of the will the share thereby settled on each of their children was ultimately divisible among all the children of that child who should attain the age of twenty-one years :—

*Held,* (1.) that, though the father was not domiciled in California at the time of the birth, the child must be treated as legitimate by the English Courts.

*In re Wright's Trusts* (1856) 2 K. & J. 595 and *Udny* v. *Udny* (1869) L. R. 1 H. L. (Sc.) 441 distinguished;

(2.) that it was not contrary to public policy to recognize legitimation in those circumstances;

(3.) that the Court must have regard to the son's status at the time when the settled funds became distributable and that accordingly he was entitled to participate in the funds of the marriage settlement as well as to those settled by the will, although he had not been legitimated at the expiry of the period of twenty-one years from the death of the survivor of his grandparents.

FARWELL J.

1940

LUCK'S SETTLEMENT TRUSTS, *In re.* LUCK'S WILL TRUSTS, *In re.* WALKER *v.* LUCK.

ADJOURNED SUMMONS.

By a settlement made on April 24, 1867, in contemplation of the marriage of Frederick George Luck (hereinafter called "the testator") and Fanny Elizabeth Walker (hereinafter called "the testator's wife"), both British subjects domiciled in England, it was directed (inter alia) that after the death of the survivor the investments and personal property settled should be held in trust for such of the issue of the marriage as they should appoint. On November 12, 1888, they appointed that the settled property should be held in trust for all the children of their marriage, directing that the share of each child should be retained by the trustees who should pay the income thereof to the child during his or her life and after his or her death should divide the share equally between all the children of that child who should have been born within twenty-one years after the decease of the survivor of the testator and the testator's wife.

By his will dated December 20, 1883, the testator bequeathed his residuary estate to trustees directing them (inter alia) to hold it in trust for all his children living at his death who should attain the age of twenty-one years. The share of each child was to be held upon trust to pay the income to that child during his or her life, and immediately after the death of each child the trustees were to hold his or her share in trust for all the children of that child who should attain the age of twenty-one years, in equal shares.

The testator's wife died on June 14, 1892, and the testator died on July 1, 1896. There were nine children of the marriage, of whom one was Frederick Charles Luck (hereinafter called "the father") born in England on January 29, 1868.

On January 26, 1893, the father married Clare Henrietta Batiste, and there were two children of the marriage, the defendants Charles Pyne Luck and Eileen Marguerite Krjesinsky Astafiev. In 1905 he left them and went to the United States of America. From 1905 till 1918 one Martha Croft lived with him as his wife, and on July 26, 1906, she bore him a son at Whittier in California, David George Croft Luck (hereinafter called "the first defendant"). The father had not then acquired a domicil in California, but he subsequently did so, and on March 5, 1920, he swore a declaration of intention there to become a citizen of the United States of America. On July 19, 1922, his marriage was dissolved by a final judgment of the Superior Court of the County of Los Angeles in California. On July 27, 1922, he married Alma Hyam. There was no issue of the marriage. On October 23, 1925, the father signed the following declaration: "This is to "certify that I, Frederick Charles Luck, do hereby publicly "acknowledge David George Croft Luck, the offspring of "Martha Croft, sometimes known as Martha Croft Luck, as "my own child and this declaration, or acknowledgment is "made for the purpose of meeting all legal requirements to "establish his relationship as such and to effect his legitima-"tion. I also declare that I have received him into my home "with the consent of my present wife, Alma Hyam Luck, "as my child, and have in all respects treated him as if he "were a legitimate child, and I hereby adopt him as such." There was evidence that the facts to which this declaration testified operated to legitimate the first defendant under s. 230, of the California Civil Code. The father died on July 6, 1938.

The first defendant having claimed to be entitled as a child of the father to share in the trust funds subject to the trusts of the settlement and the will, the plaintiffs, the trustees, took out a summons on June 15, 1939, to determine whether he was so entitled.

*J. A. Reid* for the plaintiffs, the trustees.

*J. Neville Gray K.C.* and *Belsham* for the first defendant, David George Croft Luck. The effect of the declaration of the first defendant's father was to legitimate him according to the law of his domicil. Therefore, he must be recognized by the Courts in England as a legitimate child entitled to share in the funds in question. Even though the father was not domiciled in California at the time of the birth, that is immaterial. This case is distinguishable from *In re Wright's Trusts* (1) and *Udny* v. *Udny* (1), where the decisions turned on subsequent marriage. Further, it cannot be said that there is anything in the legitimation in this case which makes its recognition by the English Courts contrary to public policy. [They referred to *In re Askew. Marjoribanks* v. *Askew* (2), and *Collins* v. *Attorney-General.* (3)]

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(1) 2 K. & J. 595.

*A. F. M. Berkeley* for the defendants, Charles Pyne Luck and Eileen Marguerite Krjesinsky Astafiev. If legitimation by adoption is to be recognized in the English Courts it is essential that the putative father should at the time of the child's birth be domiciled in the country which allows such legitimation. This is in accordance with *In re Wright's Trusts* (4) and *Udny* v. *Udny.* (1) The child at the date of its birth must have "the capacity of being made legitimate": *In re Grove. Vaucher* v. *Solicitor to the Treasury.* (5) The reason for this rule is that the child derives its status from the law of the domicil of its father at the time of its birth. The law of England does not recognize the capacity of the father to legitimate his child under another law by changing his domicil. The question what persons are to take under the settlement and the will is one of English law. Before the child can say that legitimation according to Californian law makes him legitimate for the purposes of the construction of an English document he must show that his father was domiciled in California at the date of his birth. Further, legitimation by this method contravenes the principles of English law and it would be contrary to public policy to recognize it. In any event, this child cannot participate in the funds of the marriage settlement. The legitimation took effect at the date of the adoption. At the time of vesting in 1917, twenty-one years after the death of the survivor of the child's grandparents, it could not be said that he was legitimate. Consequently he is not now entitled to a share. Moreover, to allow a child to participate in these circumstances would infringe the rule against perpetuities.

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(1) (1869) L. R. 1 H. L. (Sc.) 441.
(2) [1930] 2 Ch. 259, 275.
(3) (1931) 145 L. T. 551.
(4) 2 K. & J. 595.
(5) (1888) 40 Ch. D. 216, 233.

FARWELL J. [having stated the facts:] Having read the whole of the evidence as to the law of California, I have no doubt at all that the effect of what was done by Frederick Luck was that the first defendant became, according to that law, the legitimate son of his father as from the date of his birth, and that he would be so treated in all respects.

That being the position, the funds, which were the subject both of the marriage settlement and the trusts of the will, have now become distributable, and the question which I have to determine is whether the defendant is entitled to participate in either of them. According to the law of this country which, of course, governs the construction of these documents, the only persons who can take, under the trusts of either, are the legitimate children or issue of the testator and his wife. The question, therefore, turns upon whether, for the purpose of construing these two documents, the first defendant, David Luck, is to be treated as the legitimate son of his father or whether he is illegitimate and, therefore, barred from taking any share in either of the funds.

Whether a person is legitimate or not is a question of status and I think it is clear on the authorities that, prima facie at any rate, the question of a person's status is governed by the law of his domicil. If authority is wanted for that, it is to be found in the decision of Maugham J., as he then was, in the case of *In re Askew. Marjoribanks* v. *Askew.* (1) If the law of the domicil is to determine whether or not the first defendant is the legitimate son of his father, the answer must be, on the evidence before me, that he is to be so treated. But it has been said by Mr. Berkeley, who has argued this case with much ability, that there is an exception to that rule, in that for the law of the domicil to apply the father must have been domiciled in the place where the law in question is applicable not only at the time when the acts were done by him to make the child legitimate, but also at the time of the birth of the child. Mr. Berkeley quite rightly based his argument upon a decision of Page Wood V.-C. in the case of *In re Wright's Trusts* (2) and a later Scotch

(1) [1930] 2 Ch. 259.

(2) 2 K. & J. 595.

FARWELL J.

1940

Luck's Settlement Trusts, *In re.* Luck's Will Trusts, *In re.* Walker *v.* Luck.

case of *Udny* v. *Udny* (1), in which the same judge, as Lord Hatherley L.C. made one of the speeches in the House of Lords. It is said that those decisions show that before the Legitimacy Act, 1926, in a case where a child was made legitimate by the subsequent marriage of its parents according to the law of the country where the father was domiciled, that was not sufficient to entitle it to be treated as legitimate in England unless the father had been, at the time of its birth, domiciled in the same place. It was said by Cotton L.J. in the case of *In re Grove. Vaucher* v. *Solicitor to the Treasury* (2), that the child at birth must have "the capacity of being "made legitimate," so that if by the law of the domicil of the father at the time of its birth there was not that capacity, then the subsequent marriage of its parents was insufficient to render it legitimate according to the law of this country. There is no doubt that that is the effect of both the cases of *In re Wright's Trusts* (3) and *Udny* v. *Udny* (1), and those decisions, if they apply here, are binding upon me and I must follow them, though I confess that I feel difficulty in appreciating exactly on what ground they were based. If the law which governs status is the law of the domicil I myself find it hard to understand why, to make the child legitimate, it is not sufficient to satisfy the requirements of that law without introducing into it an element of English law. Nevertheless, I am bound by those authorities if they apply, but, in my judgment, they are not applicable to a case of this kind where the facts are so widely different. In those cases that which made the child legitimate according to the law of the domicil was the subsequent marriage of the parents, but in the present instance the position is totally different. There is no question of marriage at all. According to the law of California, s. 230 of the Civil Code, which applies to a person domiciled there: "The father of an illegitimate "child, by publicly acknowledging it as his own, receiving "it as such, with the consent of his wife, if he is married, "into his family, and otherwise treating it as if it were a

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(1) L. R. 1 H. L. (Sc.) 441.

(2) 40 Ch. D. 216, 233.

(3) 2 K. & J. 595.

"legitimate child, adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of "its birth." In my judgment the present facts are so different from those in the two cases which I have mentioned, where the act which legitimated the child was the subsequent marriage of the parents, that those decisions are not binding upon me in considering this particular problem. The law of California is peculiar, so far as I am aware, in the way in which it enables a child to become legitimate. The idea of the legitimation of a child by the subsequent marriage of his parents is, of course, not uncommon, and all the authorities in which the rule was laid down as to the necessity for the father being domiciled at the time of the birth of the child in the country whose law permits such legitimation are cases of that kind. I can find no authority which assists me in dealing with a case where the law is what it is in California.

In those circumstances, it appears that it is open to me to decide this case without being bound to follow the earlier decisions, which turn upon a different state of facts. In my judgment, if it be true to say that the question of status must, according to the law of this country, be governed by the law of the domicil, then according to that law, that is to say, the law of California, this defendant is the legitimate son of his father, and is deemed to be legitimate from the date of his birth, and as such should be entitled to participate, at any rate, in the property subject to the trusts of the will of the testator. The question must be in this case, as in all other similar cases, who are the children or issue of the testator, meaning thereby legitimate children or issue, and the only answer which can be given to it if the law of the domicil of this defendant is to be taken into consideration, as in my judgment it must be, is that he is one of the children or issue of the testator and as such is entitled to participate in his residuary estate.

I should say before I leave this matter that Mr. Berkeley has also argued, apart from the question of the domicil at the date of the first defendant's birth, that the law of England will not recognize such a legitimation as this, because it is against public policy. That is an argument to which I cannot give effect. The law of the domicil makes this defendant legitimate, and, in my judgment, it would not be right for me to say that notwithstanding that law the child must not be treated as legitimate merely because according to the views of some people in this country such a legitimation may not be desirable, or because it is contrary to the principles of the law of England by reason of the fact that the child was born of a person who was not the father's wife, and at a time when he was married to somebody else, and further that when his marriage was dissolved he married another woman, not the mother of the child. That may appear to some minds to be a most undesirable state of affairs in which to permit the child of the irregular union to be legitimated, but that is the law of the domicil, and in my judgment it would be wrong for me to say that that law was not to be applied. Therefore, so far as the property which is subject to the trusts of the will is concerned, in my judgment, the first defendant is entitled to participate.

But that does not solve the question whether that defendant is entitled to participate in the marriage settlement fund, because different considerations arise with regard to it. The children or issue who can participate in it are such lawful children or issue as were living on July 1, 1917, that is, at the expiration of twenty-one years after the death of the testator. It is said truly that if on that date or at any time before 1925 the fund had become distributable and the trustees had been called upon to distribute it among the persons entitled, they must have ignored the first defendant because, although he was then a life in being, it would have been impossible for him to prove that he was the legitimate son of his father, and that in those circumstances the Court must now exclude him, at any rate from participation in the marriage settlement fund, because he was not then a person who would have been entitled to share at all and if the trustees had refused to distribute the fund, omitting him, the Court would have ordered them to do so. It is said, no doubt truly, that had they done so this defendant could not subsequently have attacked them for having wrongly parted with the funds. But there was not a distribution in 1917, and there has not been a distribution down to this date, and, in my judgment, what the Court has to do when it is asked to determine who are the persons entitled to participate in a fund is to answer the question, having regard to all the facts as they are at the date when it is asked to make an order. The Court is not entitled to ignore or overlook any of the material facts, and one of the material facts in this case is that now this defendant must be treated as the legitimate son of his father. The fact that he was a life in being at the crucial date is not, of course, in dispute, and now he is in a position to say: "I fulfil the necessity of showing that I am "the legitimate son of my father and that I was alive on "July 1, 1917, and, therefore, am a person who is entitled to "a share in these funds." That is the state of things which the Court has to consider when it is asked to make an order for distribution or to decide the question who are entitled to participate. The Court is not, in my view, entitled to ignore the fact that this defendant is now the legitimate son of his father. It is said that this in some way offends against the rule against perpetuities, but in my judgment that is not so. This defendant was a life in being at the crucial date. It is true that he could not then have proved that he was the legitimate son of his father, but he is now in a position to fulfil that condition and the Court, taking into account the state of affairs as it is to-day for the purpose of determining what persons are to participate, must come to the conclusion that he is entitled along with the other legitimate descendants of the testator to a share in the fund subject to the trusts of the marriage settlement.

For those reasons I must hold that this defendant is entitled to share, together with the others, both in the settled fund and in the fund held under the will. The question is one of considerably difficulty, but having carefully considered the cases, though I have not cited them all, I have come to the conclusion which I have stated. I will make a declaration that the defendant, David George Croft Luck, is, as a child of Frederick Charles Luck, deceased, entitled to a one-third share in the settled share of Frederick Charles Luck in the trust funds subject to the trusts of the settlement, and a similar declaration with regard to the residuary estate of the testator. The costs of all parties as between solicitor and client must be paid out of these funds.

Solicitors: *Stibbard, Gibson & Co.; Crane & Hawkins; Kenneth Brown, Baker, Baker.*

F. C.

## *In re* JAMES MILLWARD AND COMPANY, LIMITED.

C. A.
1940
Jan. 23.

[00587 of 1939.]

*Company—Company in voluntary liquidation—Creditor's right to order for compulsory winding up—Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 255.

Sect. 255 of the Companies Act, 1929, provides that: "The "winding up of a company shall not bar the right of any creditor "or contributory to have it wound up by the Court, but in the "case of an application by a contributory, the Court must be "satisfied that the rights of the contributories will be prejudiced "by a voluntary winding up." :—

*Held*, that, on the true construction of the section, a creditor of a company in voluntary liquidation, on proving his judgment debt and that his debt has not been satisfied, is entitled ex debito justitiæ to an order for the compulsory winding up of the company.

Appeal from Bennett J.

This was a petition by a creditor of the company asking for an order for the compulsory winding up of the company.

The company was incorporated in October, 1929, under the Companies Acts, 1908 to 1917. On July 24, 1939, the petitioner obtained a judgment against the company for 5500*l*. On July 31, the company, at an extraordinary general meeting, passed a resolution that it should be wound up voluntarily. At a meeting of creditors of the company a majority in number voted in favour of the liquidator appointed by the company, but a majority in value voted against him. The petitioner voted against him. On August 29, the petitioner presented his petition for the winding up of the company, alleging that the company's statement of affairs showed that it was hopelessly insolvent, and he also alleged that the interests of the creditors would be seriously prejudiced by a voluntary winding up. An affidavit was filed by the petitioner and an affidavit in reply was filed by the liquidator. The company opposed the petition.

Bennett J. dismissed the petition.

The petitioner appealed. The appeal was heard on January 23, 1940.

C. A.
1940
James Millward & Co., *In re.*

*J. A. Wolfe* (for *E. Milner Holland* on war service) for the appellant. When a company is in voluntary liquidation, a creditor can petition for an order for the compulsory winding up of the company, and if he proves his judgment debt and that the debt has not been satisfied he is entitled to the order. That is expressly provided for by s. 255 of the Companies Act, 1929. It is to be noted that the second part of that section applies only to a contributory and not to a creditor of the company. Sect. 239 of the Act helps to illustrate the intention of the Legislature to place the interests of the creditors first.

*Morris Smith* (*Raymond Jennings* with him). Sect. 255 is at variance with s. 170, sub-s. 2, which provides that the Court, before making a winding-up order, must be satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributors. That sub-section ought to prevail.

Scott L.J. In this case the learned judge has refused to make an order for compulsory winding up of a company which was already in voluntary liquidation when the petition for compulsory winding up was lodged by a creditor. The present Act has altered the law in regard to the burden of proof that had to be met by a creditor, who desired a compulsory order for winding up when there was a voluntary liquidation already in progress. He used to have to show that the position of the creditor would be prejudiced in some way, otherwise he did not get the compulsory order. The present Act, by s. 255, explicitly, and without any ambiguity whatever, removes that burden of proof and leaves the position that the creditor is entitled ex debito justitiæ to an order. I may perhaps have overstated the burden upon the creditor even under the previous legislation. The underlying principle undoubtedly was that the creditor was entitled ex debito justitiæ to his order, but there is equally no doubt that the Act has made a difference in the respect of the burden of proof. As it stands to-day he has not to prove any facts beyond his judgment debt, that the debt has not been satisfied, and that he desires a compulsory winding up. The learned

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judge (I speak with some hesitation), I think, must have been misled by the statements about prejudice in the creditor's affidavit into thinking that the creditor is required in law to show that prejudice will result to him if the voluntary winding up is allowed to continue. Had it still been the legal position, that he had to prove real prejudice, I should have agreed with the learned judge's view that his affidavit did not show very strong prejudice; although I am not sure that I should not even under the old law have taken the same view in the ultimate result, as I am taking to-day. Be that as it may, the fact that some allegations of a rather unsubstantial kind were unnecessarily included in his affidavit does not deprive him of the right ex debito justitiæ which he has to-day; just as a judgment creditor serving a bankruptcy notice is entitled to have an order made by the bankruptcy court. The same principle underlies both, and gives to the creditor the same kind of remedy by way of a particular form of judicial execution, whether the debtor is an individual person or a company.

The appeal, therefore, must be allowed with costs here and below.

Clauson L.J. I agree. I would only desire to add this. In a case where the onus is, as in this case, on those who are opposing the winding up, I, for myself, would place but little reliance upon the affidavit of a liquidator, however eminent or however respectable, who filed evidence founded entirely or almost entirely on information and belief. Where the onus is on those who are opposing the winding-up petition, I should very much hesitate to regard the onus as discharged in a case where those who must necessarily be conversant with the whole matter, namely, the directors, do not put in any affidavit and are, therefore, not subject to cross-examination.

Luxmoore L.J. I agree.

*Appeal allowed.*

Solicitors for the appellant: *Waller, Neale & Houlston.*
Solicitors for the respondents: *Woolfe & Woolfe.*

P. J. B.

FARWELL J.
1940
Jan. 31.
C. A.
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Feb. 19.

## HOLLIS *v.* WINGFIELD.

[1936. H. 1997.]

*Revenue—Income tax—Proceeds of sale of mortgaged property in hands of mortgagee—Whether mortgagee entitled to discharge amount of income tax on interest—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 137, *sub-s.* 4; *All Schedules Rules, r.* 21.

A mortgagee of shares in a company received from the liquidator (the company being in voluntary liquidation) the proceeds of sale of property belonging to the company.

The mortgagor commenced a redemption action and an order was made, on his application, for an account to be taken of all dividends and other sums received in respect of the mortgage by the mortgagee. The account showed that the mortgagee had paid to the Inland Revenue Commissioners the income tax on the interest due under the mortgage.

A summons was taken out by the mortgagor for the determination of the question whether the mortgagee could properly make this payment to the Inland Revenue Commissioners:—

*Held,* by the Court of Appeal, affirming the judgment of Farwell J., that the mortgagee was entitled to discharge the amount of the tax for which she was liable out of the money which she had received so far as it represented interest on the mortgage.

SUMMONS.

By a mortgage deed dated September 26, 1930, William Hollis mortgaged 1270 shares of 1*l.* each in Worthing First Garden City, Ld., to Edith Barbara Finch and George William Finch as security for an advance to him of 7770*l.* out of moneys belonging to them on a joint account. George William Finch died on January 29, 1937, and all proceedings in the action hereinafter mentioned were, in February, 1938, stayed against him.

The mortgagor also created a second mortgage.

The liquidator of the company, which had for some time been in voluntary liquidation, by a deed dated December 30, 1932, acknowledged that he stood possessed of the 1270 shares subject to and charged with the payment of the said sum of 7770*l.*, owing to the mortgagee by the mortgagor. The liquidator transferred to the first mortgagees the proceeds of sale of property belonging to the company amounting to 9000*l.*

In a redemption action, commenced by the mortgagor, an order was made that (inter alia) an account should be taken of all dividends and other sums received in respect of the shares comprised in the first mortgage.

In that account sums were originally set out in respect of interest on the mortgage which were stated to be " less tax." The account, however, was subsequently amended and it was stated therein that certain sums had been paid to the Commissioners of Inland Revenue between the years 1930 and 1937 representing " income tax deducted from interest."

A summons was taken out on November 3, 1939, by the plaintiff (the mortgagor) for the determination of the question whether the defendant Edith Barbara Finch could properly make the above mentioned payment to the Commissioners of Inland Revenue shown as a payment in the amended account and sought to be charged against the plaintiff.

*Norman Daynes K.C.* and *C. A. J. Bonner* (for *J. A. Brightman* absent on war service) for the plaintiff. The first mortgagee was not entitled to pay the income tax in this way. They referred to Daniell's Chancery Forms, 7th ed., p. 657, form 1139; and to *Howells* v. *Inland Revenue Commissioners* (1); and *In re Lang Propeller, Ld.* (2)

*Herbert Hart* for the second mortgagees. It is wholly improper to throw against the security income tax which could never have become a charge if the proper procedure had originally been adopted.

Rule 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, shows that the only person directly liable is the mortgagor, and the mortgagee is not a person liable (see sub-r. 2). He also referred to Sch. A, r. VII.

*Cyril King K.C.* and *G. D. Johnston* for the first mortgagee. The mortgagor pays part of the money to the Inland Revenue Commissioners and part to the mortgagee. This interest should be charged " gross." No hardship is inflicted on the second mortgagee. It cannot be right to leave the mortgagee in possession and that he should only charge the mortgagor

(1) [1939] 2 K. B. 597.

(2) [1927] 1 Ch. 120.

the net figure, because the mortgagor has not made the payment. If the mortgagor makes the payment, that is the time at which the deduction should be made. In this case the mortgagee's charge would be the gross interest. The only lien for the charge of the tax is the capital from time to time received. The Revenue Commissioners do not always look to the mortgagor. If the mortgagor makes no payment, they very naturally look to other people. The first mortgagee took the view that r. 21 covered the case.

The first mortgagee was assessed and did in fact pay the tax.

Sect. 137, sub-s. 4, of the Income Tax Act, 1918, provides that an assessment is to be treated as good, unless it is proved to be bad.

*Norman Daynes K.C.* in reply.

FARWELL J. This is a summons taken out in an action which raises a rather unusual question with regard to the incidence of income tax in the case of certain mortgage property. The question arises in these circumstances. There was a mortgage of September 26, 1930, under which the plaintiff, Mr. Hollis, mortgaged certain shares in a company known as "Worthing First Garden City, Ld." He mortgaged these shares to a Miss Finch, to secure a sum of 7770*l.* at 8 per cent. per annum interest. The mortgage was reduced subsequently to a sum of less than 6000*l.* The company has gone into liquidation, and the moneys which have been realized by the sale of the various properties belonging to the company have been in the hands of the liquidator. The liquidator has utilized this fund in paying to the first mortgagee the amounts in his hands. The first mortgagee has received these amounts and, therefore, is to that extent mortgagee in possession. The mortgagor now desires to redeem. He has created a second mortgage, and the second mortgagee is interested in the due application of the money in the hands of the first mortgagee.

In the action an order was made on November 28, 1938, under which it appears that the plaintiff by his counsel offering to redeem the mortgage on a certain basis, certain accounts were ordered to be taken. [His Lordship read the order, and continued :] That order being made, an affidavit was made by Miss Finch, and an account was put in by her —in fact there were two accounts. The first account, which was in the usual form in a redemption action, showed the amount due for interest and capital, the amount due for interest in each case being shown as a sum less tax. The second account shows the moneys which the first mortgagee has actually received from the liquidator, in three sums, making a total of just under 9000*l.* From these accounts it appears that there will be a surplus in the hands of the first mortgagee after the amount due to her has been satisfied ; and that amount will be available for the payment-off of the second mortgagee.

Those accounts having been put in by the lady in February, 1939, and verified by affidavit, she subsequently, on July 25, 1939, put in another affidavit in which she sought to amend the account which she had put in. The amended account was based on this footing. It appears that in 1936 the lady got into communication with the inspector of taxes with regard to the income tax payable on the interest due to her under the mortgage. Certain correspondence took place between her solicitors and the income tax authorities, with the result that ultimately the liability to tax in respect of such interest was agreed at a certain sum ; and that sum was duly paid by her to the income tax authorities. At that time she had received the whole of the sums payable by the liquidator.

According to her second affidavit when the first account was put in and the first affidavit was sworn, the fact that she had paid this amount of income tax had been overlooked. She therefore desired to put in an amended account, under which credit would be given for, or under which she would be allowed to treat, the sums she had paid for tax as moneys which she was entitled to recover as against the mortgage property.

The plaintiff and the second mortgagee, who appear before me, object to that course being adopted: and they say that the only proper way of taking an account of this sort is the way in which the lady first proposed that the account should be taken, that is to say, by allowing in the account the amount due for interest "less tax" in each case. It is said that unless that course is pursued, the second mortgagee will be damnified; and it was even suggested that in some way it would be prejudicial to the mortgagor.

The position seems to me to be this. In July, 1936, the lady had got in her hands large sums representing both capital and interest, some of which was due to her as first mortgagee. She would ultimately have to bear income tax upon so much of that sum as represented interest. Knowing that, she communicated with the Revenue Authorities; and the amount which was properly payable for income tax was agreed; and paid by her. Under the Income Tax Acts and Rules, it is clear that if the mortgagor has money in his hands out of which he has to pay interest to the mortgagee, he is bound, and the mortgagee is bound, to permit him to deduct from that amount the sum properly payable for income tax, before the balance is paid over to the mortgagee. That is a provision made for the purpose of enabling the collection of the tax to be made most easily. The person who has the money in his hands is made the person to see that payment is made. But the payment being so made is not made out of money of the payee, but out of the money of the person to whom the money belongs. The payment is made by the mortgagor as agent for the mortgagee. The liability of the mortgagor to pay is only out of money in his hands, or which passes through his hands, but which in fact belongs to the mortgagee. He is under no personal liability to pay anything out of his own pocket: and if he never gets any money into his hands which would be payable to the mortgagee, apart from the question of tax, he then is under no liability at all, so far as tax is concerned.

In the present case the mortgagor has not had (and so far as I can see, until the first mortgagee and the second mortgagee have been satisfied, never will have) any part of the moneys which represent the security in his hands. Therefore, he never has had the money, and never has become liable to pay the tax. The person who is liable for the tax is the mortgagee who has had the money, and is liable, as the person who has received the money, to account for the tax.

In my judgment, in taking the course which the mortgagee took in this case, of discharging her liability for the tax out of the moneys in her hands, she was not doing anything which she was not entitled to do. If the mortgagor had had money in his hands out of which to pay the mortgagee, then the mortgagee would get no money representing interest except subject to the deduction of tax, which the mortgagor was bound to make. If the mortgagor has no money in his hands, but the money comes directly into the hands of the mortgagee, then the mortgagee in my view is bound to see that the appropriate amount for income tax on the interest is duly paid. If she takes that course, and discharges the income tax out of the moneys in her hands, then she must be entitled, as it seems to me, on taking the account, to have it taken on the footing that the mortgagor does not deduct tax which the mortgagee has already paid out of her own pocket.

It is said that the second mortgagee will be damnified by that course: but I confess that I feel great difficulty in appreciating that. The second mortgagee is entitled to nothing until the first mortgagee has been fully satisfied as to principal, interest and costs. In paying the interest, a portion of it has to go to the inland revenue for income tax. So far as the second mortgagee is concerned, whether the hand that pays the tax is the first mortgagee or the mortgagor, it seems to me to make no difference; because in any case it is a sum of money which has to be paid to the Inland Revenue, and is treated for the purposes of payment as the money of the first mortgagee.

In my judgment in the present case the mortgagee is right in saying that she is not bound to submit to an account on the footing of the first account put in by her. I am not sure that I think her second account is strictly accurate. In my view the right way is to take an account of the principal and interest; and, in calculating the interest, not to make any deduction for tax. The mortgagee will then get the full amount of the tax out of the money; and she will, therefore, get back again, as it were, the amount which she has already paid in respect of income tax.

No doubt the form of the account which was first suggested is the ordinary way of taking an account of this sort in Chambers; and I am not suggesting that it is not the right way in an ordinary case. But this is by no means an ordinary case. Here the property is proceeds of sale, that is to say, the mortgage property is represented by proceeds of sale in the hands of the liquidator which were paid over to the first mortgagee. The first mortgagee was entitled, in my view, to discharge the amount of the tax for which she was liable out of the money which she had received, so far as it represented interest on the mortgage. Having paid that, then, on taking the account, that should be taken on the footing that no deductions should be made for income tax.

J. L. D.

The plaintiff appealed. The appeal was heard on February 19, 1940.

*Norman Daynes K.C.* and *C. A. J. Bonner* (for *A. J. Brightman* absent on war service), for the plaintiff, appellant, repeated the argument which they had advanced before Farwell J., citing as further authority a passage from the judgment of Jessel M.R. in *Union Bank of London* v. *Ingram.* (1)

*Herbert Hart*, for the second mortgagees, appellants.

*Cyril King K.C.* and *G. D. Johnston*, for the first mortgagee, respondent, were not called upon to argue.

MACKINNON L.J. This problem, to me at any rate, is not at first sight at all an easy one: but I have reached a pretty clear view about it; and I have no doubt that the judgment of Farwell J. is correct.

Miss Finch was in possession of certain income which happened to be interest on a mortgage, the interest being payable to her as mortgagee. If she were paid that interest by the mortgagor, he would have been entitled to deduct the tax when paid, and indeed did so. Her liability for tax upon the interest she received would then be discharged, because she would have suffered deduction by the mortgagor when he paid the interest to her.

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(1) (1880) 16 Ch. D. 53, 56.

In this case she gets her interest. She gets it, however, not because the mortgagor pays it to her, but because, as mortgagee in possession, she has realized the security and come into possession of a certain fund out of which she is entitled to recoup herself for her capital, and to satisfy any interest due to her. So far as out of that fund she satisfies her claim for interest, she receives a portion of her income in the matter of interest. In respect to that income she is liable for income tax. The mortgagor has not paid it to her; and he has not deducted the tax. Therefore, she has no discharge of her liability for income tax by reason of its having been deducted on payment to her.

She having received a certain sum by way of interest and being liable to pay tax upon that receipt, what answer would she have to a claim for the tax by the revenue, except by putting the amount in her return for income tax, paying the tax and getting the receipt, as she has in fact done? In other words, Farwell J. seems to me to have been perfectly correct when he said the mortgagor " never has had the money "and never has become liable to pay tax. The person who is "liable for the tax is the mortgagee who has had the "money, and is liable, as the person who has received the "money, to account for the tax. In my judgment, in taking "the course which the mortgagee took in this case of "discharging her liability for the tax out of the moneys in "her hands, she was not doing anything which she was not "entitled to do."

As it seems to me, one might go further and say she was not doing anything but that which she was bound to do. In other words, I think that, in the special circumstances of this case, Miss Finch was in error in the original account which she put in when she credited her items of interest in that account less tax. If she had received those sums paid to her by the mortgagor, that would have been correct: but in fact she received those items of interest as part of the proceeds of the security which she, the mortgagee, had realized. In realizing those items of interest, she had not suffered any deduction of tax: she had got the whole amount, and she was liable to pay income tax on it.

Those being the facts in this case, the decision of the learned judge seems to me to be perfectly right, and this appeal fails.

CLAUSON L.J. I agree.

*Appeal dismissed.*
*Leave to appeal to the House of Lords refused.*

Solicitors: *Evill & Coleman; Fladgate & Co.*

J. R.

# A. LEWIS AND COMPANY (WESTMINSTER), LIMITED v. BELL PROPERTY TRUST, LIMITED.

SIMONDS J.

1940
Feb. 8.

[1938. A. 2824.]

*Landlord and tenant—Lease of tobacconist's shop—Restrictive covenant by lessors as to use of adjacent premises—Not to be used for business of sale of tobacco, cigars and cigarettes—Lease of adjoining premises to tea-shop—Sale of cigarettes to customers—Whether a breach of covenant.*

The owners of a row of shop premises leased a shop to a firm of tobacconists, and covenanted that so long as the lessees carried on their business there, they would not suffer or permit any adjoining, adjacent or neighbouring premises belonging to them to be used for the business of the sale of tobacco, cigars and cigarettes. The lessors subsequently let adjoining premises to a tea-shop company, and in the course of carrying on that business cigarettes were sold to customers at the cashier's desk:—

*Held*, that such sale being only an incidental part of the business of the tea-shop was not a breach of the lessors' covenant.

WITNESS ACTION.

By a lease dated June 7, 1937, the defendants, the Bell Property Trust, Ld., demised to the plaintiffs, A. Lewis & Co. (Westminster), Ld., certain premises, No. 12, The High, Streatham High Road, for a term of twenty-one years from March 25, 1937, at the rent therein mentioned. The lessees covenanted not, without the lessors' consent in writing, to use the premises for any other purpose than that of the business of tobacconists. The lessors on their part entered into a covenant with the lessees that they would not at any time during the term thereby created, and so long as the business of a tobacconist was carried on upon the demised premises, suffer or permit to be used or give permission to be used by others any adjoining, adjacent or neighbouring premises known as Nos. 1 to 22, The High, aforesaid, for the purposes of the business of the sale of tobacco, cigars and cigarettes as aforesaid.

Provided, however, that if the lessees should require the lessors to institute proceedings against any person who might be carrying on the trade or business of the sale of tobacco, cigars and cigarettes, the lessors would institute appropriate proceedings upon receiving security for the costs likely to be incurred.

On September 8, 1937, the defendants granted to the Aerated Bread Company, Ld. (hereinafter called "the A. B. C."), a lease of Nos. 13 and 14, The High, immediately adjoining the plaintiffs' premises. The lessees therein covenanted that they would not during the continuance of the term, without the consent in writing of the lessors, use the demised premises for any purpose other than that of the business of a restaurant and a tea-shop.

The A. B. C. shortly afterwards opened the premises as a tea-shop, and in the course of that business sold cigarettes. These cigarettes were available for purchase by any customer at the cashier's desk, and the usual practice was for the customer to buy a packet of cigarettes from the cashier when he paid his counter or restaurant bill on leaving. There was evidence that it was extremely rare for a person to enter the shop for the purpose of buying cigarettes only. No pipe tobacco or cigars were on sale. The plaintiffs brought this action to restrain the defendants from permitting their lessees, the A. B. C., to use their premises for the sale of cigarettes, in breach of the lessors' covenant in their lease to the plaintiffs, and for damages for breach of such covenant.

*H. Wynn Parry K.C.* and *F. C. Watmough* for the plaintiffs. The sale of cigarettes by the Aerated Bread Company is a breach of the lessors' covenant in the plaintiffs' lease. On the construction of the covenant the words used "the business "of the sale of tobacco, cigars and cigarettes" are equivalent to "the business of a tobacconist." What is prohibited is any branch of the business of a retail tobacconist, and the sale of cigarettes is now over 60 per cent. of a tobacconist's business. It does not matter if the sale of cigarettes is also part of a restaurant business, it is prohibited if it competes with the plaintiffs' business: see *Buckle* v. *Fredericks* (1) and *Fitz* v. *Iles* (2), where injunctions to restrain competitive activities were granted.

(1) (1890) 44 Ch. D. 244.

(2) [1893] 1 Ch. 77.

To carry on a business it is not necessary to carry it on in all its branches: *Attorney-General* v. *Plymouth Corporation.* (1) The decision in *Stuart* v. *Diplock* (2) is distinguishable on the facts. There the sale of certain articles was proved to be common to two different kinds of business.

*Charles Harman K.C.* and *J. G. Strangman* (for *Andrew E. J. Clark* on war service) for the defendants. The sale of cigarettes to the customers of a tea-shop or restaurant is part of its ordinary business and not a breach of the lessors' covenant. Practically all similar shops sell cigarettes, but the evidence shows that no customer comes in simply to buy them; he may order them after a meal, but he generally buys them in paying his bill for refreshments. The A. B. C. may sell cigarettes but the sale is incidental to their ordinary business; they are not carrying on any "business" of selling cigarettes. In *Buckle* v. *Fredericks* (3) the defendant was selling all the articles sold by the plaintiff—beer, wine and spirits. *Stuart* v. *Diplock* (2) shows that businesses may overlap without any breach of covenant: *Berton* v. *Alliance Economic Investment Co., Ld.* (4)

SIMONDS J. [after stating the facts, continued:] In these circumstances the question which I have to determine is this. First, does the A. B. C. shop carry on, on these premises, the business of the sale of tobacco, cigars and cigarettes? Secondly, if such a business is carried on on these premises, have the defendants permitted or suffered the premises to be used so that they are liable on their covenant with the plaintiffs?

I think that I may fairly say, as was said in a somewhat similar case, that this is a very puzzling point. Ultimately, I think that it is to be solved by asking oneself whether, on the fair meaning of the covenant and according to the ordinary use of language, it can be predicated of the A. B. C. tea-shop that there is there carried on the business of the sale of tobacco, cigars and cigarettes. It is, I think, at least clear that it cannot be predicated of the A. B. C. that they carry on

(1) (1908) 99 L. T. 793.
(2) (1889) 43 Ch. D. 343.
(3) 44 Ch. D. 244.
(4) [1922] 1 K. B. 742.

on these premises the business of tobacconists. Nobody, on being asked the question whether they carry on there the business of tobacconists, would answer that question in the affirmative.

I ask next whether there is any difference for this purpose between carrying on the business of a tobacconist and carrying on the business of the sale of tobacco, cigars and cigarettes. One must give a meaning, if possible, to every part of an instrument carefully drawn and entered into between the parties. Since the words " business of a tobacconist " and "business of the sale of tobacco, cigars and cigarettes " occur in immediate proximity in the same clause, I must assume that some difference was intended between the two phrases. I am disposed to think that here there is some difference between the two and that, even though the business of tobacconist as a whole was not carried on, yet the provision would be infringed if it could fairly be said that the business of the sale of tobacco, cigars and cigarettes was carried on. I have therefore to consider that question.

I find it difficult to take the view that anybody being asked this question : " What is the business which the A. B. C. "carry on at this shop ? " would reply : " They carry on "several businesses ; they carry on the business of selling "refreshments ; they carry on the business of selling con-"fectionery ; they carry on the business of selling tobacco, "cigars and cigarettes."

In my view, what is done at these premises is the carrying on of the business of a tea-shop, and that involves, among other things, the sale of cigarettes. It is common—indeed, I was told that it was almost universal—that in tea-shops of this character cigarettes should be sold. Accordingly, it appears to me that it is no more right to predicate of this shop that there is carried on there the business of the sale of tobacco, cigars and cigarettes than to say of it that there is carried on the business of the sale of milk, or the business of the sale of confectionery. There is there carried on the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold.

I was referred to a number of authorities where it was held that more than one business was being carried on. For instance, in *Buckle* v. *Fredericks* (1), the prohibition was against the trade, not the business, of, among other things, the retailing of wines, spirits or beer. The defendant, who was the lessee of a theatre, bought a piece of land adjoining his theatre and thereon he erected a building which served at once as a convenient egress from his theatre and as a place where refreshments might be sold. It was held that, in addition to the business of theatrical manager, he carried on the trade of a retailer of wines and spirits. The latter might be ancillary to the former, but it was a trade which he carried on. It seems to me, if I may say so with respect, that it was impossible to come to any other conclusion in that case.

So, also, in *Fitz* v. *Iles*. (2) There the defendants were bound by a covenant in the lease of their house not to use it as a coffee-house. The defendants were dealers in tea, coffee and other groceries, but they proposed, as ancillary to their business, and for the convenience of their customers, to sell light refreshments consisting of cups of tea and coffee, bread and butter, pastry, ham sandwiches and pork pies, to be consumed on the premises. The Court of Appeal, affirming North J., came to the conclusion in that case that the defendants were carrying on the business of a coffee-house keeper, and so clearly they were. They were carrying on the business of a coffee-house keeper as well as that of grocers. On the facts of that case, it appears to me that it was impossible to come to any other conclusion.

I was also referred to *Attorney-General* v. *Plymouth Corporation* (3) for the proposition, which, indeed, is self-evident, that a man may be said to carry on a particular trade though he does not carry it on in all its branches. So I would be prepared to concede that a man may carry on the business of a tobacconist although he does not carry it on in all its branches. I ventured to point out, in the course of the argument, that, as it is true of a trade, so it is true of a profession. A barrister may be said to carry on in the fullest sense his profession, although he does not profess to do all things that other barristers may do; so that he may equally decline to settle a deed of disentailing assurance or to prosecute at the Old Bailey.

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(1) 44 Ch. D. 244.

(2) [1893] 1 Ch. 77.

(3) 99 L. T. 793.

Other cases have been cited, such as *Lumley* v. *Metropolitan Ry. Co.* (1) and *Wartski* v. *Meaker.* (2) In each of them the test was the test of broad common sense and the meaning of the covenant.

I think that I need only refer to one other case in detail, that is *Stuart* v. *Diplock.* (3) In that case the plaintiffs carried on the business of ladies' outfitters, juvenile outfitters and the selling of baby linen. The defendants, who were assumed in that case to be under a covenant not to carry on those businesses, carried on a business which they described as that of fancy drapers and hosiers. In the course of that business they sold articles which would, in the normal course, be sold by a ladies' outfitter. Therefore, said the plaintiffs, the defendants had committed a breach of the covenant. Kekewich J. held that they had committed a breach, but the Court of Appeal took a different view. The view of the Court of Appeal is perhaps most happily expressed in the judgment of Bowen L.J., where he illustrated the fallacy of the argument by the following syllogism: "All ladies' "outfitters sell combinations, the defendants sell combinations, "therefore the defendants are ladies' outfitters." He went on: "I do not think that a covenant not to carry on the business "of a ladies' outfitter is broken by carrying on a part of that "business, which is also a part of another distinct business, even "though it be a substantial part of the business of a ladies' "outfitter and only a subordinate part of the other business."

In the present case the syllogism which Bowen L.J. referred to would be: "The business of the sale of tobacco, cigars "and cigarettes consists in selling tobacco, cigars and cigarettes. "The A. B. C. tea-shop sell cigarettes. Therefore, the A. B. C. "tea-shop carry on the business of selling tobacco, cigars,

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(1) (1876) 34 L. T. 774.

(2) (1914) 110 L. T. 473.

(3) 43 Ch. D. 343.

"and cigarettes." That, of course, is a fallacy. The tea-shop does not carry on the business of a tobacconist or the business of selling tobacco, cigars, or cigarettes because, as part of its business, it sells cigarettes, any more than it carries on, in ordinary parlance, the business of a retailer of milk because, in the course of its business, it sells milk, either in glasses or as an ingredient of a cup of tea.

Therefore, a review of all the authorities leads me back to exactly the impression which I formed on first reading this covenant. It is a question simply of the ordinary use of language: whether one can predicate of the A. B. C. that they carry on, on these premises, the business of selling tobacco, cigars and cigarettes. The conclusion to which I come is the conclusion to which I came at the outset of the case, that one cannot fairly predicate of the A. B. C. that they are carrying on that business.

But if I am wrong on that, then a difficult question arises, namely, whether that which is being done is being or has been permitted or suffered by the defendants. If it were necessary to form a final conclusion on that point, which it is not in view of the decision to which I have come on the first point, I should want a further consideration of the matter. I merely throw out this suggestion. No case has been cited to me which, in my view, involves the proposition that a person who has entered into such a covenant as this and then demised the premises for a purpose which he knows or ought to know would involve the prohibited user, is entitled to rely on that fact and say: "I am not liable; "I have not permitted this, because I have put it out of my "own power to prevent the user for the purpose of which I have "demised the premises." It is not necessary to come to a final conclusion on that matter, because, in the view which I take on the first point, the question does not arise.

In the result, the action must be dismissed with the usual consequences.

Solicitors: *Zeffertt, Heard & Morley Lawson; Simmons & Simmons.*

H. L. L.

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## CAMDEN NOMINEES, LIMITED *v.* FORCEY AND ANOTHER.

*Contract—Inducement to breach of contract—Dispute between owners and tenants of flats—Tenants' association formed—Threat to withhold rent—Rent actually withheld—Common interest no justification in law.*

A block of flats was let to a number of tenants holding on monthly tenancies under a standard form of agreement. The tenants agreed to pay rent one month in advance, and the owners agreed to provide central heating, constant hot water, a lift, cleaning and lighting of the staircase and passages, porterage and other services.

Some tenants having complained that the owners were not fulfilling their obligations as regards heating and cleaning, meetings were held and a tenants' association was formed, in consequence of which a number of tenants withheld their rents for some months, and others threatened to do so unless certain grievances from which they claimed to suffer, were remedied.

In an action against the chairman and the secretary of the association to restrain them from inducing other tenants from committing a breach of their tenancy agreements by withholding rent, the judge found that the defendants had induced and at the date of the writ threatened to induce tenants so to withhold rent:—

*Held*, that assuming that the defendants were acting, as they claimed, in the common interest of all the plaintiffs' tenants who complained of grievances, that was no justification for procuring a breach of contract, as the tenants had a remedy at law for any such breach; nor on the facts could the defendants' action be justified on the ground that they were performing a public service.

*Brimelow* v. *Casson* [1924] 1 Ch. 302 discussed and distinguished.

MOTION with witnesses.

The plaintiffs, Camden Nominees, Ld., were the owners of a block of some sixty flats, known as Highstone Mansions, Camden Road, London, N.W., let to tenants on monthly tenancies at rents payable one month in advance. The plaintiffs, in their standard form of agreement, agreed to provide central heating, constant hot water, lighting and cleaning of staircase and passages and other services.

The plaintiffs brought this action and moved therein to restrain the defendants, Miss Ethel May Forcey and Ronald Vincent Bennett, from doing any acts, or making any statements, or taking any steps calculated or intended to induce the tenants of the plaintiffs' flats to commit breaches of their tenancy agreements by a refusal to pay their rents. The plaintiffs claimed that an association had been formed among the tenants to press for a remedy for certain grievances of which they complained, particularly lack of sufficient heating, that the defendants as chairman and secretary were the chief organizers of the association and had advised and induced a number of tenants who had joined it to withhold their rent. The defendants denied these allegations. The plaintiffs denied that they had committed any breaches of contract. The facts, as found by the learned judge, are fully stated in the judgment.

*Sir George Jones* and *S. W. Magnus* for the plaintiffs.

*Harry Lester* for the defendants.

On the evidence there was no inducement by the defendants of other tenants to commit breaches of contract by withholding their rent. At the meeting on November 20 a number of tenants spontaneously resolved to withhold their rent until their grievances should have been remedied, and other tenants afterwards followed their example. To advise a breach of contract for existing reasons is not the same as to induce a breach.

But if the Court should find that the defendants, or either of them, have induced breaches of contract, then there was justification for their action. The plaintiffs had been guilty of breaches of covenant causing injury to their tenants, and the defendants had a common interest with all those tenants in getting a remedy for their grievances. If A breaks one of the terms of his contract with B, he cannot complain if B subsequently breaks one of the terms of his contract with A. The result is that in the same circumstances A has no right of action against C for inducing B to break his contract. The plaintiffs proposed to collect their monthly rents without performing certain services, which they had agreed to do. The exact limits of " justification " in cases of inducing a breach of contract have never been exactly settled. The question is discussed in *South Wales Miners' Federation* v. *Glamorgan*

*Coal Co., Ld.* (1), where it was held that what is sufficient justification cannot be exactly defined, and it must be left to the determination of the Court in each case. In that case Vaughan Williams L.J. held that advice was not inducement and that there was sufficient justification, but Romer and Stirling L.JJ. held there was no justification.

In *Brimelow* v. *Casson* (2) Russell J. held that intolerable conditions and gross under-payment for the chorus girls of a touring company were a sufficient justification for inducing a breach of contract. It is contended that the facts in the present case bring it within *Brimelow* v. *Casson* (2), and that if the defendants have induced any breaches of contract, they were justified in so doing.

*Sir George Jones* and *S. W. Magnus* in reply referred to *Smithies* v. *National Association of Operative Plasterers* (3) and *Read* v. *Friendly Society of Operative Stonemasons.* (4) Where there are independent contracts between A and B, a breach by A of his contract with B does not entitle B to commit a breach of his contract with A. That doctrine of justification was definitely rejected in the former case.

No case has ever held that justification can succeed where there is another legal remedy open to the defendant. Here the tenants who were being sued for rent were told they could counterclaim if they alleged any breach of contract by the landlords, but only one of them has done so. If the inducement of tenants to withhold rent is an act of the tenants' association, then, as it is an unincorporated body, the defendants, as members of it, are clearly liable.

*Cur. adv. vult.*

1940. Feb. 27. SIMONDS J. In this action the plaintiffs, Camden Nominees, Ld., claim an injunction restraining the defendants, Miss Ethel May Forcey and Ronald Vincent Bennett, from doing any acts or making any statements or taking any steps calculated or intended to cause or induce

(1) [1903] 2 K. B. 545, 573; Affd. [1905] A. C. 239.

(2) [1924] 1 Ch. 302.

(3) [1909] 1 K. B. 310, 337.

(4) [1902] 2 K. B. 88, 732.

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the plaintiffs' tenants of Highstone Mansions, Camden Road, London, or any of them, to commit breaches of their tenancy agreements with the plaintiffs by non-payment of rent or otherwise.

The matter came before me on motion some short time ago, when, it appearing that there was an acute conflict of evidence, on which cross-examination was desirable, I adjourned the hearing for that purpose. And, since both parties wished it, I also assented to the hearing of the motion being treated as the trial of the action without pleadings. It would have been better if I had not done so, for I might then have had stated with precision the pleas on which the parties rely.

The law as I understand it is that if A without justification knowingly interferes with a contract between B and C he commits an actionable wrong. It is on the words "without "justification" that the difficulty arises, and it was to consider them that I reserved judgment in a case otherwise very clear.

Two questions have to be considered: (I.) Have the defendants knowingly interfered with the contracts between the plaintiffs and their tenants, or do they threaten to do so? (2.) If yea, have they justification in law for doing so?

The facts, as I find them, are shortly as follows. The plaintiffs are the owners of a block of flats known as Highstone Mansions, Camden Road. The flats are let on tenancy agreements which are in a standard form, each agreement containing (*a*) an obligation on the tenant to pay his rent, usually by monthly instalments in advance, and other usual obligations; and (*b*) certain obligations on the landlord, including that of lighting the staircase and landings and keeping them properly cleaned and swept, and of maintaining constant hot water and central heating.

The defendant, Miss Forcey, is the tenant of flat No. 49, the defendant Bennett, of flat No. 44, and there have at all material times been some sixty other tenants in the block.

In the autumn of 1939 certain of the tenants complained that the landlords were not satisfactorily carrying out their obligations under the tenancy agreements. How far their complaints were well-founded I do not propose to consider.

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I am content to assume that they were made in good faith.

On October 28 Miss Forcey addressed a long letter to the plaintiffs in which she set out her grievances, demanded their redress and concluded by saying: "Pending satisfaction I am "reluctantly compelled to give instructions for withholding "rent." This, she told me, meant that she would cancel her bankers' order for payment of rent. A similar course had already been taken by at least one other tenant. It is clear, nor has the contrary been suggested by her counsel, that it is no answer to a claim for rent for the tenant to say that the landlord has not performed his obligation to clean the staircase or furnish hot water. Miss Forcey was, therefore, in her letter taking up a position which in law was not tenable. To her letter of October 28 and another written on the following day, she received an answer dated November 6, which gave her no satisfaction.

In the meantime she had, naturally enough, taken counsel with other tenants, including her co-defendant, Bennett. A small group of them had held a meeting in one of the flats, at which it was resolved to form a tenants' association of which Bennett should be secretary. On November 10 a notice signed by Bennett, "Secretary pro. tem.," was delivered at the flats in the block. It was in these terms: "Dear Sir or "Madam,—An association of tenants of Highstone Mansions "is being formed to deal with difficulties regarding lack of "heating, hot water, porterage and other facilities which "repeated complaints have failed to improve. It is the intention of the association to approach the landlords and insist "on the maintenance of proper services. A meeting of "tenants will be held at 8 P.M. on Monday, November 13, "at No. 44. If you are interested will you kindly sign this "notice and return to me.—Yours faithfully, R. Vincent "Bennett, Secretary pro. tem." The notice at the bottom is in these terms: "I am interested in joining the association. "Number" so-and-so. "Please state whether you can attend "the meeting," and the answer is to be filled in. The word "insist" is used. It may be that the authors of this notice had in mind some process of law, or they may have contemplated the use of some other weapon. On this there is no satisfactory evidence.

On November 13 the meeting was duly held in the defendant Bennett's flat. According to the minutes, which were signed by Miss Forcey, there were present thirteen persons who were tenants, or the wives of tenants, and in addition certain persons who were described as "representatives of the St. Pancras "Tenants' Defence League." Various aspects of the tenancy agreement were discussed, and it was agreed that the tenants had grounds of complaint, and that they held the landlords responsible for breach of contract with regard to several matters set out in the minutes. The representatives of the St. Pancras Tenants' Defence League explained the objects and activities of their organization, saying that it operated democratically for civic services and was an unpolitical body, and answered many questions. They then left.

It was then decided to form a tenants' association of the tenants of Highstone Mansions, and a committee was elected of which Miss Forcey was chairman, Bennett secretary, and certain other tenants members. It was further resolved that one member on each floor should canvass for new membership to the association, and that the committee should meet on the following day to draft a constitution and formulate a plan of action. The propriety and legality of this gathering and of its aims as they appear in the minutes are beyond question. No mention is made of withholding of rent and, though I find it hard to believe that the meeting met and dissolved without any reference to the weapon which Miss Forcey had herself threatened to use, I should not be justified in finding that any attempt was then made by her, or Bennett, to induce other tenants to take that course.

On November 14 and 16, meetings of the committee were held. The defendants were both present at both meetings, as a result of which a constitution of the association was drafted after further consultation with the St. Pancras Tenants' Defence League, and it was decided to affiliate the association to that body.

I need not refer to the constitution beyond saying that the objects of the association were defined to be (*a*) by united co-operative effort to safeguard the rights and interests of tenants of Highstone Mansions, and (*b*) to affiliate to organizations with similar aims and objects; and that such objects are lawful, and that the means of attaining them may be lawful or unlawful.

On November 17 Bennett again circularized all the tenants stating what had been done at the general meeting on November 13, and by the committee since that date, that another general meeting would be held on November 20, at 8 P.M., and that it was " to the advantage of all tenants in "no matter what circumstances to attend this meeting."

On November 20 a general meeting was duly held. In addition to Miss Forcey in the chair and Bennett as secretary and other members of the committee, there were present seventeen tenants or wives of tenants, and for part of the time also representatives of the St. Pancras Tenants' Defence League. Certain amendments were made in the draft constitution, which as so amended was agreed. It was then resolved that the committee should send a letter forthwith to the landlords setting out a list of the tenants' complaints and demanding negotiation and early reply, and it was further resolved (with two dissentients) that failing satisfactory response by the landlords, and the remedying of complaints, rent should be withheld. There is a conflict of evidence about the part played by the defendants at this meeting. I will complete the history of events before dealing with that question.

Immediately after the meeting Bennett, as secretary of the association, wrote to the secretary of the plaintiffs a letter dated November 20, stating the tenants' grievances and claims, and asking that representatives of the plaintiffs should meet representatives of the association. He said that he expected to hear from the plaintiffs to that effect by Friday, the 24th instant, and that pending such meeting any legal action should be stayed forthwith. This referred, I think, to the fact that the plaintiffs had already taken or threatened action with regard to certain rent in arrear.

On the next day, November 21, Bennett sent a further circular to all the tenants. The first two paragraphs of the circular were as follows: "(1.) Following up the big meeting "of last night, if you have not already done so, will all members "(including those who were unable to attend) please write "down all their grievances and difficulties of the past and "present, and leave at the secretary's address—Flat 44? "(2.) Will those few tenants who were unable to attend let the "secretary know that they are supporting the large majority "of the tenants, and will make common cause with them? "Will members please arrange to sign the constitution at the "earliest convenience?" The circular then goes on to say that a strong and clear letter has been sent to the landlords demanding a meeting, and to ask for subscriptions.

On November 23, the plaintiffs' solicitors answered Bennett by a letter which the association no doubt regarded as wholly unsatisfactory. They rejected the complaints as totally untrue or else as very much exaggerated and as being an attempt to justify the non-payment of rent, and said that, while prepared to deal with individual tenants, the plaintiffs did not propose to recognize the association.

On the next day Bennett retorted by reasserting the validity of the complaints and saying: "Rent is being temporarily "withheld until such time as we are satisfied that the landlords "have fulfilled their obligations under the agreements."

On November 27, a general meeting of the association was held at which the defendants and other members of the committee and thirteen members of the association attended. It appears that at this meeting the conduct of the committee in their correspondence with the plaintiffs and their solicitors was approved, and a further letter was drafted for tenants to inform the landlords that rent was being withheld. This letter was addressed to the secretary of the plaintiffs, and was as follows: "Sir, I hereby endorse the letter of the Highstone "Mansions Tenants' Association of November 20, and pending "a satisfactory conclusion of the proposed negotiations I "have to advise you that I am withholding the rent presently "due." Letters in this common form were on November 26 signed and sent to the plaintiffs by twelve tenants, and on December 2 by four more tenants, including Bennett.

On December 2 there was issued to all tenants a notice which is headed : "Report 2.12.39," for which both defendants admit responsibility. Two paragraphs in it may be noticed. The first runs : "Several tenants have been visited by the "landlords' representative in an effort to 'divide and conquer' "and in each case he has been unsuccessful and referred to "the association. If, therefore, you receive a visit, please "advise a member of the committee. It is to be hoped (and "expected) that tenants will stick together in accordance "with the democratic resolution of the general meeting. "This is the testing time."—Then, after a paragraph which I need not read, there is this paragraph : "If you have not "yet :—(*a*) paid your sub. ; (*b*) signed the constitution ; "(*c*) notified the landlords you are withholding rent pending "satisfactory conclusion to the communication the association "has addressed to them ; (*d*) not sent us details of your own "complaints and claims—please communicate with the "secretary, chairman, or members of the committee—Flats "Nos. 44, 49, 52, 20, either calling personally or leaving a note "stating when you are available to be seen." No further event of any importance took place before December 15, when the writ in this action was issued.

I return to the meeting of November 20. The defendants would have me believe that the important resolution then passed for the withholding of rent was something for which they were not in any way responsible, and that the idea of doing so was, in some way which they could not explain, generated in the minds of those present. On the other hand, Miss Dribbell, who was one of the two dissentients, deposed to the fact that Miss Forcey said that she and certain other tenants had stopped paying their rents and requested all the tenants present to do the same, and that it was she who invited the tenants to withhold their rents and asked them to signify their consent by raising their hands. In this she was corroborated by the other dissentient, Mrs. Farren. Having heard and seen the witnesses I have no hesitation in accepting this evidence, which moreover accords with probability. Miss Forcey was the protagonist in this dispute; already on October 28, she had adopted for herself this method of persuading the plaintiffs to remedy her grievance. It would be strange if, realizing that such a method would be more persuasive, if not coercive, when adopted by others, she did not advocate its adoption. I believe the witnesses who say that she did what I should have expected her to do. Against Bennett there is no evidence of any spoken word. But it is clear that he took a leading part in forming the association and guiding its policy, and the so-called report of December 2, for which, as I have said, he candidly admitted responsibility, by itself demands that I should find against him on the issue of endeavouring to persuade his fellow tenants to break their agreements by withholding rent.

Against both defendants, then, I must find for the plaintiffs on the first question, and the second question then arises whether the defendants had justification in law for what they did. This is a field in which it behoves a judge of first instance to walk warily. He has little to guide him.

By the end of the nineteenth century it had been clearly established as the result of a number of cases, of which *Lumley* v. *Gye* (1), *Bowen* v. *Hall* (2), and *Temperton* v. *Russell* (3) may be taken as the landmarks, that it is an actionable wrong without justification to interfere with the contractual rights of another. That this result was not easily reached may be seen from the powerful dissenting judgment of Coleridge J. in the first, and Coleridge L.C.J. in the second, of these cases. But while the general proposition was thus established and, as is generally accepted, a remarkable development made in the law of torts, no corresponding definition was given of what amounts to justification for such interference. Thus in *Quinn* v. *Leatham* (4), Lord Macnaghten said: "It is a violation of "legal right to interfere with contractual relations recognized by "law if there be no sufficient justification for the interference," but he did not say what is sufficient justification. In *Read*

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(1) (1853) 2 E. & B. 216.

(2) (1881) 6 Q. B. D. 333.

(3) [1893] 1 Q. B. 715.

(4) [1901] A. C. 495, 510.

v. *Friendly Society of Operative Stonemasons* (1), Darling J., after citing Lord Macnaghten's statement of the law, instanced as an example of justification the case of a man who had entered into two inconsistent contracts with A and B, and could not perform the one without breaking the other. In such a case it was suggested that A, insisting on his contractual rights, was not liable at the suit of B. He gave no other example of justification. The same case in the Court of Appeal (2) is useful ✓ as showing (*a*) that what is otherwise wrong is not made better by an honest belief that it is very much to the advantage of the person committing the wrong, and (*b*) that, where illegal means are used, "just cause" cannot come into the discussion at all. In *Glamorgan Coal Co., Ld.* v. *South Wales Miners' Federation* (3) a further discussion of justification will be found. In the dissenting judgment of Vaughan Williams L.J., there are passages which indicate that community of interest might constitute justification, but I do not think that this view is consistent with the judgment of the majority of that Court or with the judgment of the House of Lords to which I shall presently refer. Romer L.J., after referring to the observations of Lord Collins M.R. in *Read's* case (1) said: "I respectfully agree with what Bowen L.J. said in the *Mogul* "case (4), when considering the difficulty that might arise "whether there was sufficient justification or not: 'The good "'sense of the tribunal which had to decide would have to "'analyse the circumstances and to discover on which side "'of the line each case fell.' I will only add that, in analysing "or considering the circumstances, I think that regard might "be had to the nature of the contract broken; the position "of the parties to the contract; the grounds for the breach; "the means employed to procure the breach; the relation "of the person procuring the breach to the person who breaks "the contract; and I think also to the object of the person "in procuring the breach." He and Stirling L.J. agreed in holding that no duty lay on the defendant federation which justified them in acting as they did. But that a duty to interfere which might amount to justification could exist was in their judgment clear.

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(1) [1902] 2 K. B. 88, 95.
(2) [1902] 2 K. B. 732.
(3) [1903] 2 K. B. 545, 574.
(4) [1892] A. C. 25.

On this case going to the House of Lords (1) the general proposition was reasserted, but it is to be observed that their Lordships were careful not to travel beyond the facts of the case before them. Lord Halsbury refused to discuss cases where, on moral or religious grounds, people may be justly advised to refuse to perform what they have agreed to do, and equally he refused to enter into a discussion of the duty or moral right to tender advice. Lord Macnaghten, while saying that he did not doubt that there might be justification for that which was in itself an actionable wrong, and that it would not be difficult to give instances, putting aside altogether cases complicated by the introduction of moral considerations, did not give any such instances. Lord James accepted the proposition, but did not in this respect illuminate it. Lord Lindley, after dealing with the proposition that all the officials of the federation did was to advise the men, and observing that it was not necessary to consider what a parent or guardian might do to protect his child or ward, and that it might be admitted that there were cases in which it was not actionable to exhort a person to break a contract, dismissed as untenable the proposition that the officials of the federation had a moral or social duty to do their best for the men which justified their action.

In *Smithies* v. *National Association of Operative Plasterers* (2) it was once again sought, but sought in vain, to justify the procurement of breaches of contract of service by workmen. It was there held that a bona fide belief on the part of the union that the employers were intending to evade a settlement of the dispute in accordance with the agreement or even an actual intention on the part of the employers so to do, did not constitute justification for inducing the workmen to break their contract. Again it was recognized that there might be justification, and Buckley L.J. gave the familiar example of inconsistent contracts, but no other example. He added, however, this observation, which bears on the present case:

(1) [1905] A. C. 239, 244, 245, 252. (2) [1909] 1 K. B. 310, 337.

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"The contention of the defendants here is: 'We were entitled "'to induce Forrester to break his contract with you because "'you had broken your contract, as contained in the National "'Agreement, with us.' This is setting up that, where there "are two independent contracts, the breach of the one by "the one party entitles a breach of the other by the other "party. This contention, in my opinion, cannot be "maintained."

In *Pratt* v. *British Medical Association* (1) McCardie J. summed up the authorities by saying that malice in the sense of spite or ill-will was not an ingredient of the action; and, secondly, that no justification existed by reason of the fact that the defendants acted either for the advancement of their own trade interests or of the interests of those with whom they were associated.

Thus the law stood when, in 1924, Russell J. decided in *Brimelow* v. *Casson* (2) that the defendants, though they had procured the breach by certain theatre proprietors of their contracts with the plaintiff, had a sufficient justification for their action. The learned judge, after citing the passage from the judgment of Romer L.J. in the *Glamorgan* case (3), and considering all the circumstances of the contracts which had been broken, said: "These defendants, as it seems "to me, owed a duty to their calling and to its members, and, "I am tempted to add, to the public, to take all necessary "peaceful steps to terminate the payment of this insufficient "wage, which in the plaintiff's company had apparently "been in fact productive of those results which their past "experience had led them to anticipate." In the sixteen years which have passed since this decision there has been, so far as I am aware, no case in which justification has been successfully pleaded.

In *De Jetley Marks* v. *Greenwood* (4), Porter J. said, with regard to that plea: "The justification must, I think, involve "an action taken as a duty, not the mere protection of the "defendants' own interests." In *British Industrial Plastics,*

(1) [1919] 1 K. B. 244, 266.
(2) [1924] 1 Ch. 302, 313.
(3) [1903] 2 K. B. 545, 574.
(4) [1936] 1 All E. R. 863, 873.

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*Ld.* v. *Ferguson* (1) Slesser L.J. said that he thought that there might be justification, but this was not necessary to his decision inasmuch as it was not established that the defendants knew that they were procuring a breach of contract, and such knowledge is a necessary ingredient of the tort.

In addition to these, the only relevant English authorities of which I am aware, there is a large body of American cases on this branch of the law, but, instructive though they are, I do not think that I can usefully refer to them. The result which plainly emerges is that it is for the defendant to justify, and that his task is a difficult one.

In the present case, if I rightly understand their learned counsel, the defendants have pleaded that they are justified in their otherwise actionable wrong on two grounds; the first, that they and those whom they would persuade to break their contracts have a common interest in making the landlords perform their obligations; and the second, that there is such a state of affairs here existing, on the one side tenants who are weak and on the other landlords who are strong and take advantage of their strength, that it is justifiable for the defendants to use a weapon which would otherwise be wrongful.

In my judgment, there is no validity in either of these contentions. The defendants owed no duty to their fellow tenants; they sought their co-operation for their own ends, though no doubt a successful campaign would have been for the benefit of all alike. The end which they sought, namely, the performance by the landlords of their obligations, was one which could be reached by process of law. If the landlords broke their contract the law gave the defendants their remedy by way of damages, or in a proper case by way of specific performance. There is neither reason nor authority for the suggestion that in such circumstances a common interest can justify the interference with contractual rights. If A, B, C, and D meet together and agree that in order to persuade or coerce X to a certain course they will each break their contracts with him, that would, I apprehend, be an actionable

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(1) (1939) 160 L. T. 95.

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conspiracy. It would be a strange thing if A, calling together B, C, and D, and urging them to break their contracts could justify that act on the ground of common interest. This contention must, in my judgment, fail.

The second contention was one which appeared to be directed less to my reason than to my emotions. The case was put as something analogous to *Brimelow* v. *Casson* (1), in which any step that put an end to an intolerable position might be regarded as justifiable. *Brimelow* v. *Casson* (1) stands alone, and has been the subject of a good deal of controversy. In a comparable case it would be my duty to follow it, though I would humbly suggest that on the facts stated in the judgment that case might have been simply disposed of by the application of the maxim Ex turpi causa non oritur actio. But, however that may be, there is no real analogy between the two cases. It is a ✓ dangerous proposition that inequality in wealth or position justifies a course otherwise actionable, and that tenants may against their landlord adopt measures of self-help because in their judgment the law does not afford them adequate remedy for his default.

I would only add, in deference to the argument addressed to me, which I think was intended to be founded on *Brimelow* v. *Casson* (1), that neither that case nor any other case supports the view that those who assume the duty of advising the withholding of rent or any other breach of contract can justify their action by protesting that they are performing a public service. Advice which is intended to have persuasive effects ✓ is not distinguishable from inducement, and there is no reason to suppose that the giving of such advice is justifiable except by those persons in whom the law recognizes a moral duty to give it.

In the result I hold that the defendants without justification interfered with the plaintiff's contractual rights and it is clear that at the date of the issue of the writ they intended to continue to do so. I must therefore grant an injunction as asked.

The plaintiffs, further, claim damages on the footing that they have suffered some loss by the withholding of rent by the tenants induced thereto by the defendants, but say that they will be content with a nominal sum. On this footing I award them 20s. damages, and I order the defendants to pay the costs of the action, the motion being, by consent, treated as the trial of the action.

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(1) [1924] 1 Ch. 302.

Solicitors: *Phoenix, Levinson, Walters & Shane; S. Seifert & Co.*

H. L. L.

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*Feb.* 14, 22.

## *In re* HENDERSON.

## PUBLIC TRUSTEE *v.* REDDIE AND OTHERS.

[1939. H. 3549.]

*Apportionment—Dividends—Endowment fund to be raised after tenant for life's death and administered by trustees of will—Appropriation to answer fund—Dividends accruing to tenant for life's death—Payable to personal representatives—Apportionment Act,* 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 3, 4, 5.

On the death of the tenant for life under a will, the trustees of the will appropriated investments to meet an endowment fund, provided for by the will and to be administered by themselves. They later received, on those investments, dividends payable in respect of a period which began before and ended after the tenant for life's death. On a summons by one of the trustees asking (inter alia) whether, in the case of the appropriated investments, any apportionment or adjustment in respect of income should be or ought to have been made in favour of the tenant for life's estate out of the notional purchase price received by the trustees on the appropriation :—

*Held,* that the tenant for life's personal representatives were entitled to receive the dividends accruing to the date of her death, and that the appropriation by the trustees to meet an endowment fund to be administered by themselves did not defeat that right.

*Bulkeley* v. *Stephens* [1896] 2 Ch. 241 ; *In re Winterstoke's Will Trusts* [1938] Ch. 158 ; and *In re Firth. Sykes* v. *Ball* [1938] Ch. 517, considered.

ADJOURNED SUMMONS.

James Stewart Henderson (hereinafter called " the testator ") died on January 20, 1933, and his will dated June 18, 1907, and codicil dated January 17, 1933, were proved on February 28, 1933. Alicia Frances Burkitt, the tenant for life under the will (hereinafter called " the tenant for life ") died on July 6, 1939. The trustees of the will appropriated certain investments to meet a fund created by the will to endow a convalescent home and to be controlled by themselves. On these investments they later received dividends payable in respect of a period beginning before and ending after the tenant for life's death.

By this summons, taken out on November 15, 1939, the Public Trustee, as one of the trustees of the will, asked whether, in the case of the appropriated investments, any and what apportionment or adjustment in respect of income in favour of the tenant for life's estate should be or ought to have been made out of the notional purchase price received by the trustees on the appropriation.

The defendants to the summons were Mr. Samuel George Reddie and Mr. Charles Dewen Thomson, the tenant for life's personal representatives (Mr. Thomson being also an executor and trustee of the testator's will and codicil); the Hampstead General and North-West London Hospital, a residuary legatee; and the Attorney-General.

The facts are fully stated in his Lordship's considered judgment.

*Leslie F. Mumford* for the Public Trustee. It was thought that, in order to pay estate and succession duty on the tenant for life's death, it would be necessary to sell "cum interest" securities which, after the appropriation, formed part of the balance of a sum of 150,000*l.* directed by the will to be set apart and invested, and in respect of which interest, over a period partly before her death, would have been payable after the sale: and, accordingly, the summons asks whether, in the case of those securities, any and what apportionment or adjustment in respect of income in favour of her estate should be or ought to have been made out of the actual purchase price received by the trustees. The sale, however, has not been necessary, and the Court is therefore not now asked to answer that question.

*John Pennycuick* for the tenant for life's executors. The tenant for life's executors are entitled, as her personal representatives, to that part accruing before her death of the interest received since her death by the testator's trustees in respect of the appropriated investments. In *In re Muirhead* (1), in which counsel for the tenant for life's representatives

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(1) [1916] 2 Ch. 181, 185, 186.

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submitted that ss. 2 and 5 of the Apportionment Act, 1870, applied to the case and covered it. (1) Eve J. held that whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation. Also *Bulkeley* v. *Stephens* (2) is definitely an authority for the proposition that, where there is an appropriation among residuary legatees, the tenant for life's personal representatives are entitled to be paid a portion of the dividends. [He referred to *In re Winterstoke's Will Trusts* (3), and *In re Firth.* (4) ]

*Hector Hillaby* for the Hampstead General and North-West London Hospital, representing the residuary legatees. In the present case the trustees, by appropriating the investments as they have done, have really acted as if they had sold them and reinvested the proceeds of sale. Actually, the will directs the trustees to " raise " the sum of 100,000*l.* and then " invest " it. It therefore follows that, when they have carried out those directions, the position is just as if they had sold the appropriated investments cum dividend,

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(1) Sect. 2. : " From and after "the passing of this Act, all rents, "annuities, dividends, and other "periodical payments in the nature "of income (whether reserved or "made payable under an instrument in writing or otherwise) "shall, like interest on money lent, "be considered as accruing from "day to day, and shall be apportionable in respect of time "accordingly."

Sect. 5 : "In the construction "of this Act—. . . . The word " ' dividends ' includes (besides "dividends strictly so called) all "payments made by the name of "dividend, bonus, or otherwise "out of the revenue of trading or "other public companies, divisible "between all or any of the "members of such respective "companies, whether such payments shall be usually made or "declared at any fixed times or "otherwise ; and all such divisible "revenue shall, for the purposes "of this Act, be deemed to have "accrued by equal daily increment "during and within the period for "or in respect of which the payment of the same revenue shall "be declared or expressed to be "made, but the said word ' divi" ' dend ' does not include payments in the nature of a return "or reimbursement of capital."

(2) [1896] 2 Ch. 241.

(3) [1938] Ch. 158.

(4) [1938] Ch. 517.

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with the consequence that there ought not to be any apportionment. [He referred to Lewin on Trusts, 14th ed., p. 372, and *In re Walker.* (1)]

*A. Andrewes Uthwatt* for the Attorney-General. Certain cases decided quite recently have given rise to doubts with regard to the duties of trustees to the personal representatives of tenants for life when the trustees have sold or transferred to beneficiaries investments, on which dividends are accruing at the tenant for life's death, before those dividends have become due and payable. With regard to investments which they have sold, there appears to be a conflict between the decision of Clauson J. in *In re Winterstoke's Will Trusts* (2) on the one hand, and Stirling J.'s views in *Bulkeley* v. *Stephens* (3), and Farwell J.'s views in *In re Firth* (4), on the other: and with regard to investments which they have transferred, there appears to be a conflict between part of Farwell J.'s decision in *In re Firth* (4) on the one hand, and Stirling J.'s views in *Bulkeley* v. *Stephens* (3), on the other. It is therefore most desirable that the Court should, in the present case, deal generally with trustees' duties in such cases.

*Cur. adv. vult.*

1940. Feb. 22. MORTON J. The testator, James Stewart Henderson, by his will, dated June 18, 1907, appointed David George, William Robert Kington Gibbs and William Littlejohn Law to be executors and trustees thereof. Clause 11 of his will is as follows: "I direct my trustees out of my estate "to set apart the sum of one hundred and fifty thousand "pounds and to invest the same in their names in manner "permitted by law for the investment of trust money with "power to vary investments and to pay the income of the "invested fund to the said Alicia Frances Burkitt during "her life for her separate use without power of anticipation "and after her death to raise out of such fund or so far as it "may be insufficient out of my residuary estate the clear sum

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(1) [1934] W. N. 104.

(2) [1938] Ch. 158.

(3) [1896] 2 Ch. 241, 249, 250.

(4) [1938] Ch. 517.

"of one hundred thousand pounds to be held upon the trusts "hereinafter declared concerning the same and to stand "possessed of the balance if any of such fund and the income "thereof as part of my residuary estate."

Clause 12, so far as material, is as follows: "I give to my "trustees hereinbefore named and their heirs my freehold "house at Hastings called 'Abbotsford' and the stables "outbuildings gardens pleasure grounds and land held there- "with upon trust that my trustees shall permit the said "Alicia Frances Burkitt during her life to have the use and "enjoyment thereof for her separate use without power of "anticipation she paying all rates and taxes and keeping the "buildings in a proper state of repair and properly insured "against fire as from the day of my death to the satisfaction "of my trustees and after her death shall stand possessed "thereof upon trust to permit the same to be used and for "ever enjoyed as a convalescent home for the benefit of poor "and necessitous persons residing within the Borough of "Hampstead and I further direct my trustees to invest the "sum of one hundred thousand pounds bequeathed by the "last preceding clause in their names in any investments by "law authorised to trustees with power to vary investments "and to employ and apply the income of the invested "fund as an endowment for the upkeep insurance and "maintenance of the said house and grounds for the "purposes of such convalescent home and for carrying on "such home to the best advantage and in the best interest "of the inmates and staff. . . . ." Clause 12 also gave the trustees certain powers which are not material for the present purpose.

Clause 15 is as follows: "all the rest residue and remainder "of my real and personal estate of whatsoever kind and "wheresoever situate of or over which I shall at my death "be possessed or have any power of appointment or "disposition I give devise and bequeath to my said trustees "hereinbefore named upon trust to sell call in collect and "convert into money the said real and personal estate at such "time or times and in such manner as shall seem expedient "and out of the net proceeds and any ready money forming "part of my estate to pay and provide for my funeral and "testamentary expenses and debts and the pecuniary legacies "and annuities bequeathed by this my will or any codicil "thereto and all death duties payable under my will and "subject as aforesaid to stand possessed thereof in trust" for thirty-one charitable institutions therein specifically named, of which the defendant, the Hampstead General and North-West London Hospital, is one, "and also such other "charitable institutions or purposes (if any) as my trustees "may in their absolute discretion nominate and select. . . . ."; and the testator directed that the shares and the manner in which and the conditions, if any, subject to which his residuary estate was to be divided pursuant to that clause were to be in the absolute discretion of his trustees. The rest of the will is not material.

By a codicil dated January 17, 1933, the testator made an alteration in his executors and trustees, but in all other respects confirmed his will.

The testator died on January 20, 1933, without having revoked or altered his will except by the codicil, and his will and codicil were duly proved by the plaintiff and the defendant Charles Dewen Thomson on February 28, 1933, in the Principal Probate Registry.

The plaintiff and the defendant Charles Dewen Thomson as executors and trustees of the will duly set apart the sum of 150,000*l.* and invested that sum in accordance with the directions in that behalf contained in clause 11 of the testator's will, and they paid the income of the invested fund received by them up to the death of Alicia Frances Burkitt to Alicia Frances Burkitt. Alicia Frances Burkitt died on July 6, 1939, having by her will appointed the defendant Samuel George Reddie and the defendant Charles Dewen Thomson to be the executors and trustees thereof. Her will was duly proved by the executors therein named on September 4, 1939.

On July 25, 1939, the plaintiff and the defendant Charles Dewen Thomson as trustees of the testator's will appropriated

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certain investments, forming part of the 150,000*l.* fund, to answer the "clear sum of 100,000*l.*" mentioned in clause 11 of the will. These investments were 29,490*l.* 5*s.* 2*d.* $3\frac{1}{2}$ per cent. War Loan, 50,000*l.* 3 per cent. Conversion Stock 1949–1953, 5200*l.* Brighton Corporation 3 per cent. Stock 1933–1953, 10,000*l.* City of Bath $3\frac{1}{2}$ per cent. Mortgage, and 10,000*l.* Nottingham Corporation $3\frac{9}{16}$ per cent. Mortgage.

It is to be observed that by clause 11 the trustees are directed to "raise" this sum out of the 150,000*l.* fund, and by clause 12 they are directed to "invest" this sum in any investments authorized by law to trustees, but there is in my view no doubt that the trustees could properly appropriate investments of a nature authorized by law and of the value of 100,000*l.* in satisfaction of this sum of 100,000*l.*, without going to the trouble and expense of selling out and reinvesting.

For reasons which will appear later, I do not think that the trustees valued these investments on the correct basis, but I shall return to this point when I have decided the question specifically raised by the summons.

This question arises in the following circumstances: After the date of appropriation (July 25, 1939), the trustees received certain interest on the appropriated investments, which was paid in respect of a period commencing before the death of Alicia Frances Burkitt and ending after that death. For convenience I refer to the sums so received as "interest," but it makes no difference to the question which I have to decide if they fall more aptly under the description of "dividends" or of "other periodical payments in the nature "of income." There can be no doubt in my view that they fall within s. 2 of the Apportionment Act, 1870, which I quote hereafter.

The defendants Reddie and Thomson, as executors of Alicia Frances Burkitt, claim that the proportion of this interest which accrued up to the date of her death ought to be paid to them as her legal personal representatives. I have to decide whether this claim is or is not well founded.

Sect. 2 of the Apportionment Act, 1870, provides as follows. [His Lordship read it, and read also the material part of s. 5, and continued :] In view of s. 2, the interest in question must be considered as accruing from day to day and must be "apportionable in respect of time accordingly." Sect. 3 of the Act, so far as material, is : "The apportioned part "of any such rent, annuity, dividend, or other payment shall "be payable or recoverable in the case of a continuing rent, "annuity, or other such payment when the entire portion of "which such apportioned part shall form part shall become "due and payable, and not before. . . . ." Sect. 4, so far as material, is : "All persons and their respective heirs, "executors, administrators, and assigns, and also the executors, "administrators, and assigns respectively of persons whose "interests determine with their own deaths, shall have such "or the same remedies at law and in equity for recovering "such apportioned parts as aforesaid when payable (allowing "proportionate parts of all just allowances) as they respectively "would have had for recovering such entire portions as "aforesaid if entitled thereto respectively. . . . ."

In *In re Muirhead* (1) Eve J. observed : "In my opinion, "whenever there are periodical payments accruing when "the event calling for apportionment occurs, the Act is at "once brought into operation and must be applied, and when, "subsequently, the accruing payments become due and "payable they must be distributed in accordance with the "Act as applied on the occurrence of the event which brought "it into operation." With that observation I respectfully agree.

I now proceed to apply the Apportionment Act, 1870, as interpreted in *In re Muirhead* (1), to the facts of the present case. The investments in respect whereof the interest in question was paid are still in the hands of the trustees of the testator's will. The trustees have received the interest in question. This interest must be considered as accruing from day to day and is apportionable in respect of time accordingly. A portion of the interest, therefore, accrued during the life of Alicia Frances Burkitt. Unless the appropriation made on July 25, 1939, in some way defeats the

(1) [1916] 2 Ch. 181, 185, 186.

rights of this lady's legal personal representatives, her legal personal representatives are clearly entitled to the portion which accrued during her life. Can the appropriation defeat the rights of this lady's legal personal representatives? In my judgment it cannot. The Act of 1870 was brought into operation with regard to the interest in question at the lady's death. The interest in question became due and payable to the trustees at a subsequent date and was in fact paid to them. On receiving this interest they were bound to give effect to the rights which had come into existence under the Act of 1870 and to pay to the lady's legal personal representatives the portion of the interest which accrued during her lifetime. For the moment I pass over the question what would have been the position if the trustees had sold the investments producing this interest, or had transferred these investments to persons absolutely entitled thereto under the testator's will, between the date of the lady's death and the date on which the interest in question became payable. The investments were not so sold or transferred, but were still in the names of the trustees. In these circumstances I can see no answer to the claim of the legal personal representatives of Alicia Frances Burkitt.

Having arrived at this conclusion by the process of applying the words of the Apportionment Act, 1870, as interpreted in *In re Muirhead* (1), to the facts of the present case, I must now consider whether there is any authority which leads me to a different conclusion. As will appear, I do not think there is any such authority, but it is necessary for me to consider carefully the case of *In re Firth* (2), and Mr. Andrewes Uthwatt has urged me to deal generally with the duty which trustees owe to the legal personal representatives of a deceased tenant for life, when investments on which dividends are accruing at the death of the tenant for life are sold by the trustees, or transferred to beneficiaries by the trustees before such dividends have become due and payable. He stated that recent decisions have raised doubts on this matter, and he referred in particular to an apparent

(1) [1916] 2 Ch. 181.

(2) [1938] Ch. 517.

conflict, first, as to investments so sold, between the decision of Clauson J., as he then was, in *In re Winterstoke's Will Trusts* (1), and the views expressed by Stirling J., as he then was, in *Bulkeley* v. *Stephens* (2), and by Farwell J. in *In re Firth* (3) cited above; secondly, as to investments so transferred, between a portion of the decision of Farwell J. in *In re Firth* (3), and the views expressed by Stirling J. in *Bulkeley* v. *Stephens.* (2) I think that I ought to accede to Mr. Andrewes Uthwatt's request, having regard to the fact that the present case involves a consideration of *In re Firth* (3), and that the judgment in *In re Firth* (3) contains a full discussion of the decisions in *Bulkeley* v. *Stephens* (2) and *In re Winterstoke's Will Trusts.* (1)

I shall assume that A.B. is entitled under a will to receive during his life the income of a trust fund consisting of a number of investments. At the date of A.B.'s death a dividend, as defined in the Apportionment Act, 1870, is accruing on each of these investments. At the date when any such dividend becomes due and payable, the trustees of the will may still retain the investment in respect whereof the dividend is payable, or they may have parted with the investment under various circumstances. I propose to examine three cases: Case A. The investment in respect whereof the interest or dividend is payable is still held by the trustees of the will on the date when the dividend becomes due and payable. In this case, for reasons which I have already stated, the general rule is that the trustees must pay over the proper apportioned part of the dividend to the legal personal representatives of A.B. I do not think it makes any difference whether at this date the trustees hold the investment in trust to pay the income thereof to a tenant for life whose life interest arose on the death of A.B., or on trust for a person absolutely entitled thereto, or on trust to divide it among a number of persons absolutely entitled. Nor do I think it makes any difference if a trust for sale, not yet carried out, arose on the death of A.B. If the trustees receive the

(1) [1938] Ch. 158.

(2) [1896] 2 Ch. 241.

(3) [1938] Ch. 517.

dividend, a portion of it belongs to the estate of A.B. There may be exceptions to this general rule, but no exception occurs to me at the moment.

Case B. The investment in respect whereof the interest or dividend is payable has been transferred to a person absolutely entitled under the will, or divided among a number of persons absolutely entitled under the will, before the dividend becomes due and payable. In my view the trustees ought not to have so transferred the investment without making some arrangement to ensure that the legal personal representatives of A.B. will be able to obtain payment of the proper apportioned part of the dividend. Let me assume, however, that the trustees have transferred the investment in question before the dividend becomes due and payable to some person or persons absolutely entitled to the capital, without making any arrangement as to the apportioned part of the dividend. Is the right of the legal personal representatives of the tenant for life thereby defeated? In my opinion it is not. The transferees claim under the same will which directed payment of the income to A.B. during his life. They have received a dividend, a portion whereof belongs to the estate of A.B., and they are bound to pay it over to his legal personal representatives. In my view, however, if the trustees procure a valuation of an investment, with a view to its appropriation in satisfaction or part satisfaction of a share in the trust fund, the valuation should take into account the fact that no such appropriation can defeat the claim of the legal personal representatives of A.B. to an apportioned part of the dividend.

In *Bulkeley* v. *Stephens* (1) the tenant for life died on September 2, 1894. Certain stock was sold cum dividend on January 29, 1895, under an order of the Court of November 12, 1894. In June, 1895, a "balance dividend" was declared in respect of the year ending December 31, 1894. Stirling J. said (1): "In the present case the trust at the "death of the tenant for life is thus expressed: 'To pay, "'transfer and assign my residuary estate and the stocks,

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(1) [1896] 2 Ch. 241, 249, 250.

"' funds, and securities upon which the same shall be invested "' unto and amongst ' a particular class of beneficiaries, who "have been proved to be very numerous. That trust would "be properly carried out, not by sale of the investments, but "by transfer of them to the beneficiaries ; and, if so carried "out, it would be the duty of the trustee so to transfer that "the legal personal representative of the tenant for life should "be able (either directly or through the intervention of the "trustee) to obtain payment of the apportioned part of the "dividend to which the tenant for life was entitled. The "order of November 12, 1894, was made, not in the execution "of any trust or power for sale vested in the trustees, but in "order to facilitate the division of the testator's residuary "estate. I do not doubt that the order was properly made, "but it was made in the absence of the legal personal "representatives of Mrs. Lyne Stephens." (She was the tenant for life.) " If those legal personal representatives "had been present they might have urged with success that "Mrs. Lyne Stephens' estate ought not to be placed in a worse "position than if the trust had been carried out in the strict "and proper mode—namely, by transfer to the legatees. "That being so, I think that the legal personal representatives "may still assert the same right ; and, under these particular "circumstances, the application ought to be acceded to." This passage seems to show quite clearly that in Case B, A.B.'s legal personal representatives would be entitled to an apportioned part of the dividend and that this right would not be defeated by any transfer to the persons entitled to the capital. In the particular circumstances of the case before him, Stirling J. acceded to the claim of the legal personal representatives, even although the stock had been sold, and his reason was that the legal personal representatives " ought "not to be placed in a worse position than if the trust had "been carried out in the strict and proper mode—namely, "by transfer to the legatees." By these words he intimates quite plainly that, in his view, the claims of the legal personal representatives of the tenant for life would not have been defeated if the investments had been transferred to the legatees. For my own part, I cannot see any reason why these claims should be so defeated, but a doubt was raised in my mind by a few words in the judgment of Farwell J. in *In re Firth* (1), and by one branch of his decision in that case. In *In re Firth* (1) Farwell J. had to deal with two cases, (1.) where investments had been sold cum dividend at a date between the death of the tenant for life and the payment of the dividend which was accruing at her death; (2.) where investments had been appropriated and transferred to beneficiaries cum dividend at a similar date. His decision appears to have had this result, that in neither case did the legal personal representatives of the tenant for life receive an apportioned part of the dividend or any sum representing such apportioned part. Farwell J. began his judgment by referring to "such investments as were sold or appropriated "cum dividend," and it would appear that his decision may have covered the investments appropriated and transferred to beneficiaries as well as the investments sold. So far as it related to the investments sold, I entirely agree with it, as will appear hereafter. So far as it related to the investments appropriated and transferred to beneficiaries, it would seem to be in conflict with the observations of Stirling J. in *Bulkeley* v. *Stephens* (2), which I have already quoted, and it might also have some bearing on the present case. It would be possible to distinguish the decision of Farwell J. on this point from the present case on the ground that Farwell J. was dealing with appropriations which had been carried out by transfers to the beneficiaries, while I am dealing with an appropriation which results in the investments still being held by the trustees of the will. In the case before me, the trustees actually received the interest whereof a proportion is claimed by the legal personal representatives of the tenant for life. In *In re Firth* (1) the dividends or interest on the appropriated investments were received by the beneficiaries. It seemed to me, however, that this was not a very satisfactory distinction, since I could see no good reason why the beneficiaries to whom investments were transferred, in the case of *In re Firth* (1),

(1) [1938] Ch. 517.

(2) [1896] 2 Ch. 241, 249, 250.

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should be able to retain, as against the legal personal representatives of the tenant for life, the portion of the dividends which accrued during the life of the tenant for life. Further, I observed that the argument, as reported, was directed only to the case of the investments which had been sold, and the reasoning of the judgment also appeared to be directed only to those investments. For this reason I discussed *In re Firth* (1) with my brother Farwell, before writing this judgment, and he has informed me that when he delivered judgment his mind was directed only to the case of the investments which had been sold. Under these circumstances, I cannot regard *In re Firth* (1), as being an authority for the proposition that the claim of the legal personal representatives of the tenant for life can be defeated by a transfer of investments, in respect whereof dividends were accruing at the death of the tenant for life, to persons becoming absolutely entitled to the trust fund on the death of the tenant for life. The headnote to that case, which refers only to the case of investments which had been sold, is in my view quite correct.

I now come to the third of the three cases which I set out to examine: Case C. The investment in respect whereof the interest or dividend is payable has been sold by the trustees cum dividend, that is to say, together with the dividend which was accruing at the date of the death of the tenant for life. In this case, the dividend is received by the purchaser, who has contracted that he shall receive it. He cannot, of course, be called upon to pay over any part of it to the legal personal representatives of A.B. But the question arises: Are the legal personal representatives of A.B. entitled to receive from the trustees any part of the proceeds of sale? At first sight it would seem just that they should receive some part of these proceeds. If the investment had not been sold before the dividend became due and payable, or had been sold ex dividend, the legal personal representatives of A.B. would have been entitled to receive a part of the dividend, and it is reasonable to assume that the purchase price was greater to some extent

(1) [1938] Ch. 517.

by reason of the fact that the investment was sold cum dividend. In my view, however, the general rule is that there is no apportionment of the purchase price in favour of the legal personal representatives of the tenant for life. This general rule was recognized by Stirling J. in *Bulkeley* v. *Stephens* (1), and was recognized and applied by Clauson J. in *In re Walker* (2) and by Farwell J. in *In re Firth.* (3) In *In re Winterstoke's Will Trusts* (4) Clauson J. did not think it right to apply the rule on the facts of the case before him. It would appear from the report of this case that the attention of Clauson J. was not drawn to his previous decision in *In re Walker* (2), but I appeared as counsel in *In re Winterstoke's Will Trusts* (4) and I have a recollection that I cited *In re Walker* (2) in my argument and submitted that the facts in *In re Winterstoke's Will Trusts* (4) justified a departure from the general rule. Whether my recollection is accurate or not, I respectfully agree with the judgment of Farwell J. in *In re Firth* (3) with regard to the investments which had been sold, and I also respectfully agree with his observations on *In re Winterstoke's Will Trusts* (4).

I desire only to add a few brief observations. When an investment has been sold cum dividend after the death of a tenant for life, and the trustees ascertain that a dividend was subsequently declared and paid to the purchaser in respect of a period beginning before the date of the death of the tenant for life and ending after that date, there is, of course, no difficulty in determining what proportion of that dividend accrued during the life of the tenant for life. It is a mere matter of arithmetic, and the sum of 2160*l.* 13*s.* 1*d.*, which in *In re Winterstoke's Will Trusts* (4) was directed to be paid to the executors of the tenant for life, was a sum ascertained by this arithmetical calculation. It is, however, a very different matter if one endeavours to ascertain by what sum the purchase price was increased by reason of the fact that a dividend was accruing at the date of the sale. Let me assume that an investment, upon which a dividend is paid half-yearly, is

(1) [1896] 2 Ch. 241.
(2) [1934] W. N. 104.
(3) [1938] Ch. 517.
(4) [1938] Ch. 158.

sold cum dividend when five months of the half-year have expired. Can it ever be ascertained with accuracy what portion of the purchase price represents the dividend which is accruing ? I suspect that the cases in which this could be ascertained with accuracy are rare, and this consideration seems to me to afford some justification for the general rule which is, in my view, applicable to Case C.

Mr. Hillaby, for the charity representing the residuary legatees, suggested that the appropriation made by the trustees in the present case was equivalent to a sale of the investments so appropriated and a re-investment of the proceeds of sale. He described it as a notional sale cum dividend and investment of the proceeds of sale, and he drew attention to the fact that the will directs the " raising " of a sum of £100,000 and the subsequent investment thereof. On this footing, he suggested that the present case fell within Case C., and that there should be no apportionment. I decline to deal with the matter on the footing that the trustees sold the investments in question on July 25, 1939, and received 100,000*l*. as the proceeds of sale. I think it is right to deal with the matter on a more realistic footing. The trustees did not sell these investments and the interest in question was not received by a purchaser from them ; it was received by the trustees, and part of the interest so received belongs, in my view, to the tenant for life.

I must now deal with the question whether, in view of my decision as to apportionment, the Trustees have valued the appropriated investments on the correct basis. In my judgment, they have not, since they valued the investments on the basis that no part of the accruing interest was payable to the legal personal representatives of the tenant for life. Mr. Andrewes Uthwatt (appearing for the Attorney-General as representing the charity constituted by clause 12 of the will) suggests that further investments, equal in value to the sum payable to the legal personal representatives of the tenant for life, ought to be appropriated in order to make up the full sum of 100,000*l*. Mr. Hillaby very properly states that he cannot resist this claim. This must be done and I shall give general

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liberty to apply in case any difficulty arises with regard to this or any other matter.

I have now dealt with the only question as to which the plaintiff asks for a decision. The question raised under sub-heading (*b*) of paragraph 1 of the summons does not arise, owing to circumstances which were explained by Mr. Mumford in opening the case.

The costs of all parties, as between solicitor and client, will come out of the balance of the 150,000*l.* fund.

Solicitors: *Waltons & Co.*; *R. S. Fraser & Co.*; *Treasury Solicitor.*

K. R. A. H.

# *In re* BLAIBERG.

MORTON J.

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Feb. 28.

## BLAIBERG AND PUBLIC TRUSTEE *v.* DE ANDIA YRARRAZAVAL AND BLAIBERG.

[1939. B. 4006.]

*Will—Codicil—Forfeiture clause—" Of the Jewish faith "—Uncertainty.*

A second codicil to a testator's will provided : " . . . . should " any child or grandchild of mine . . . . marry any person not " of the Jewish faith, such child or grandchild shall forfeit and " be deprived of any interest or share under my said will, or " codicil thereto . . . . " :—

*Held* that the condition was void for uncertainty and did not affect or limit a bequest to grandchildren contained in a third codicil of the same date.

ADJOURNED SUMMONS.

This summons was issued to determine whether a forfeiture clause in a codicil was valid, or was void for uncertainty.

By a second codicil, dated May 15, 1905, to his will dated June 25, 1902, Solomon Blaiberg (hereinafter called " the "testator ") provided that any child or grandchild of his who should marry any person not of the Jewish faith should forfeit and be deprived of any interest or share under his will or the codicil thereto. By a third codicil of the same date, he gave 100*l.* to each of his grandchildren living at his death, provided in any case that no marriage forbidden by him had been contracted : and by a fourth codicil dated February 12, 1908, he provided that if any son, daughter, or grandchild of his or the widow of any son of his should cease or fail to profess, or intermarry with any person who should not profess, the Jewish faith, that son, daughter, grandchild, or widow should forfeit and lose all benefits under his will or any codicil thereto. The testator died on April 8, 1909.

The Marquise De Andia Yrarrazaval, a granddaughter of the testator (hereinafter called " the granddaughter "), married, on December 16, 1924, a man who, according to evidence in support of the summons, she understood to be not of Jewish ancestry and, at the time of the marriage, not to be of and not to profess the Jewish faith. That marriage was dissolved and, on April 15, 1926, she married the Marquis De Andia Yrarrazaval. That marriage also was dissolved, on July 23, 1931. The executors and trustees took the view that she had forfeited her legacy of 100*l.*, and did not pay it to her: and by this summons, as amended in accordance with leave given after judgment had been delivered, Mr. Joseph Blaiberg (a son of the testator) and the Public Trustee, two of the trustees of the will and codicils, who were the testator's surviving legal personal representatives, asked whether the condition contained in the second codicil was void for uncertainty, and whether it in any way affected or limited the bequests to grandchildren in the third codicil. The defendants to the summons were the granddaughter and Mr. Alfred Moses Blaiberg, the third trustee of the will and codicils, who, also, was interested in residue.

The facts are fully stated in his Lordship's judgment.

*C. V. Rawlence* for the plaintiffs. The plaintiffs take the view that the granddaughter has forfeited her legacy. The evidence is clear that she married a person who, she understood, was not, at the time of the marriage, "of the "Jewish faith." That fact brings her within the forfeiture clause.

*H. B. Vaisey K.C.* and *J. F. Bowyer* for the granddaughter. In December, 1938, Farwell J. delivered judgment on a summons entitled *In re Blaiberg's Will Trusts. Hyman* v. *Blaiberg* (1938. B. 1122). He had to decide whether the forfeiture clause in the fourth codicil was valid. He found that the phrase "who shall cease or fail to profess, or intermarry "with any person who shall not profess, the Jewish faith," was uncertain, and held the forfeiture clause void for uncertainty and as tending to infringe the rule against perpetuities.

In the present case the forfeiture clause is not now effective, because it has been superseded by the forfeiture clause in the fourth codicil. Also, the forfeiture clause in the present case is void for uncertainty. It is not contended that it is void on any other ground or for perpetuity. Farwell J. found that the words "shall cease or fail to profess, or intermarry "with any person who shall not profess, the Jewish faith" were uncertain: and the words "not of the Jewish faith" must be still more uncertain.

*M. Gravenor Hewins* for the second defendant.

MORTON J. In this case I have to determine whether a forfeiture clause contained in a codicil to the will of Solomon Blaiberg is valid or is void, as it is suggested to be, on the ground of uncertainty.

The parties to the summons are as follows: the plaintiffs are the surviving legal personal representatives of the testator and two of the trustees of his will; the first defendant is a granddaughter of the testator, and the second defendant, Alfred Moses Blaiberg, is the third trustee of the testator's will and is also interested in the residuary estate.

The testator made his will on June 25, 1902. I do not think that it is necessary for me to read any part of the will for the purposes of this case. There was then a first codicil, which is also immaterial, and a second codicil, which contained the forfeiture clause in question. It is in the following words: "And I do hereby declare that should any child or grandchild "of mine at any time whether before or after my decease "marry any person not of the Jewish faith, such child or "grandchild shall forfeit and be deprived of any interest or "share under my said will, or codicil thereto, and my said "will and any codicil thereto shall be construed as if such "child or grandchild had been dead at the time of his or her "contracting any such marriage as above mentioned."

The third codicil is in the following terms: "I hereby "give to each of my grandchildren living at the time of my "decease the sum of 100*l.*, such legacy to vest and be payable "in the case of a grandson on his attaining the age of 21 "years and in the case of a granddaughter on her attaining "that age or marrying under that age provided in any case "no marriage as forbidden by me has been contracted." That codicil bears the same date as the second codicil.

There is then a very long fourth codicil, in which the testator, except in certain respects, revokes the provisions of his will and former codicils with regard to the residue of his estate. He deals with his residue in a manner which I need not specify for the benefit of his one daughter and his six sons and their respective families. Clause 20 of the fourth codicil is: "I further declare that if any son, daughter or "grandchild of mine or the widow of any son of mine shall "at any time hereafter and either before or after my death "cease or fail to profess, or intermarry with any person who "shall not profess the Jewish faith, then and in any such "case such son daughter grandchild or widow shall thereupon "and as from that time forfeit and lose all benefits under my "said will or any codicil thereto in like manner in all respects "as if he or she had died in my lifetime. But this provision "shall not prejudice or affect the interest which any child or "children of any son daughter or grandchild of mine suffering "such forfeiture as aforesaid would have been entitled to "under the foregoing provisions if such forfeiture had not "taken place."

The testator made fifth and sixth codicils to his will, which are not material. The granddaughter was born on May 15, 1906; and she was, therefore, born in the lifetime of the testator, who died on April 8, 1909. On December 16, 1924, the granddaughter was married in Paris to one Dimitry Kolomnine; and the affidavit of Mr. Jacob, Assistant Public Trustee, in support of the summons says: "It being understood by such defendant" (that is, by the granddaughter) "that the said Dimitry Kolomnine was not of Jewish ancestry "and that at the time of such marriage he was not of and "did not profess the Jewish faith." No further evidence is filed on the matter; and it rests so far on this: it is said that the granddaughter "understood" the matters which I have just mentioned.

That marriage was dissolved; and on April 15, 1926, the granddaughter was married in London to the Marquis de Andia Yrarrazaval. That marriage was dissolved on July 23, 1931. The executors and trustees of the will have never paid the legacy to the granddaughter, taking the view that she had forfeited it: and no interest has ever been paid in respect of it.

In 1938 a summons was taken out, which came before my brother Farwell; and he delivered judgment on December 14, 1938. He had to decide on the validity, not of the forfeiture clause which I am considering, but of the forfeiture clause which appears in clause 20 of the fourth codicil.

Mr. Vaisey for the granddaughter suggested—I do not think I can say that he strenuously argued it—that the forfeiture clause which I have to consider was superseded by the forfeiture clause in the fourth codicil, and for that reason was no longer effective. But I cannot take that view. I cannot find any revocation of the forfeiture clause contained in the second codicil; and, further, the legacies given to the grandchildren by the third codicil were given only provided that no marriage forbidden by the testator had been contracted.

Secondly, Mr. Vaisey submits that the forfeiture clause is void for uncertainty. He does not rely on any other ground, or suggest that it is void for perpetuity; but he points out that Farwell J. found uncertainty in the phrase: " shall cease " or fail to profess, or intermarry with any person who shall "not profess the Jewish faith"; and he argues that the words "any person not of the Jewish faith" are still more uncertain.

Farwell J., at the conclusion of his judgment, stated very definitely that his decision was one on the particular language of that will, and that he did not want it to be taken that his decision in the case created any precedent in any other case except, possibly, in a case where the language was precisely the same.

There are, however, passages in the judgment of Farwell J., apart from the actual decision, which I find helpful. Farwell J. said: " In construing the clause, it must be borne in mind "that this is a forfeiture clause, and, as such, must be construed "strictly, but it must not be held invalid merely because it is "a forfeiture clause, if the Court is satisfied that it is a certain "clause. Now what exactly is meant in a case of this sort

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“is, I think, illustrated and explained quite plainly in a
“recent judgment of Lord Romer in the Privy Council, in the
“case of *Sifton* v. *Sifton.* (1) I do not think it is necessary
“for me to do more than refer to one passage in that judgment.
“Lord Romer says : ‘ In *In re Sandbrook. Noel* v. *Sand-*
“‘ *brook* (2), Parker J. stated the principle in these words :
“‘ “conditions subsequent, in order to defeat vested estates,
“‘ “or cause a forfeiture, must be such that from the moment
“‘ “of their creation the Court can say with reasonable certainty
“‘ “in what events the forfeiture will occur.” In *In re Viscount*
“‘ *Exmouth. Viscount Exmouth* v. *Praed* (3), Fry J. used the
“‘ following language : “the condition must be clear and
“‘ “certain. That, in my opinion, includes, not only certainty
“‘ “of expression in the creation of the limitation, but also
“‘ “certainty in its operation. It must be such a limitation
“‘ “that, at any given moment of time, it is ascertainable
“‘ “whether the limitation has or has not taken effect.” ’ ”
After a further quotation from the speech of Lord Romer in that case, Farwell J. continues : “ Now, as I understand that, “it is this : a forfeiture clause is not necessarily void because “a person may not be able to know whether the thing which “he is doing or is proposing to do will necessarily create a “forfeiture, but, on the other hand, it must be such a condition “that the Courts at all times can say definitely or not that “that which has been done amounts to a forfeiture or does not “amount to a forfeiture, as the case may be.”

Farwell J. then turns to the words of the clause which he was construing, and adds : “ In my judgment, the Court “must be in a position to say whether or not some particular “act does or does not create a forfeiture.” He then considered the clause which he had to construe in more detail, and he made these, among other, remarks on it : “ It seems “to me that the phrase ‘ cease or fail to profess ’ is a term “capable of many meanings, and it would be impossible, in “my judgment, in many cases to determine with any certainty “whether a person had or had not ceased or failed to profess.

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(1) [1938] A. C. 656, 670.

(2) [1912] 2 Ch. 471, 477.

(3) (1883) 23 Ch. D. 158, 164.

"Whether a person who, while outwardly professing to be a "member of the religion, in fact was not a member of it, "would forfeit under this clause, I know not, and it would, I "think, be impossible to ascertain." As I read that observation, Farwell J. is saying: It is really impossible to ascertain whether a person in fact, in his own mind, holds a particular religious belief. It is not a matter which the Courts can ascertain with certainty.

It seems to me that the clause which I have to construe is still more uncertain than the clause which had to be construed by my brother Farwell. It seems to me that, while "professing" a faith may be a matter of outward observance, the question whether a person is "*of* the Jewish faith" or not is a matter which lies in his or her own conscience and is a matter of belief. Supposing, for example, that the marriage had taken place in a synagogue, to my mind that would not establish that the other contracting party was of the Jewish faith. In my view it depends on whether he holds or does not hold certain beliefs. What are the beliefs which make a man of the Jewish faith or not of the Jewish faith I do not know. It is possible that the Court could ascertain that by evidence. I do not know whether there would be any difference of opinion among persons called as witnesses to say what are the beliefs that it is necessary for a man to hold in order to be of the Jewish faith. But the further question, does a particular man hold those beliefs, is not, to my mind, a matter which a Court can ascertain with certainty.

Taking this particular case, supposing that I held that the condition was valid, I imagine that I should then have to direct an inquiry whether Mr. Dimitry Kolomnine was, on December 16, 1924, of the Jewish faith. It does not seem to me that that is an inquiry which the Court would undertake.

I do not think that it is at all easy to see in what sense those words are used; but if they are used in the sense that I have indicated, it appears to me that the matter is one far too uncertain for the Court to give effect to the forfeiture clause. I adopt the words of Farwell J. when he says that the condition must be such a condition "that the Courts at

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"all times can say definitely or not that that which has been "done amounts to a forfeiture, or does not amount to a "forfeiture, as the case may be." In my view the condition which I am considering is not such a condition as that, and is void for uncertainty.

I do not think that any other authorities are of any real assistance on this question of construction, which turns upon the particular words this testator has used. No case has been brought to my attention where this phrase " of the "Jewish faith," or, indeed, " of " any other faith, has been used.

Accordingly, I declare that the condition contained in the concluding paragraph of the second codicil is void for uncertainty, and does not affect or limit the bequest to the testator's grandchildren in the third codicil.

There will be liberty to apply for directions as to the payment of the legacy and interest. The costs of all parties, as between solicitor and client, will come out of the estate.

Solicitors: *Harold E. Blaiberg; Burton & Ramsden.*

K. R. A. H.

# WILSON *v.* LONDON MIDLAND AND SCOTTISH RAILWAY COMPANY.

C. A.
1940
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[1939. W. 2288.]

*Railway company—Directors—Powers and rights—Annual general meeting—Issue of stamped proxies to stockholders holding* 2500*l.* *stock or more—Directors also directors of other companies trading with the railway—Companies Clauses* (*Consolidation*) *Act,* 1845 (8 & 9 *Vict. c.* 16), *ss.* 64, 65, 76, 85, 87.

The directors of a railway company are entitled to send out stamped proxy forms in their names to stockholders holding not less than a minimum amount of stock, such as 2500*l.*, in order to secure a quorum of votes at the annual general meeting, and if they do so they are not bound to send out proxy forms to all the stockholders.

A director of a railway company is not disqualified from holding his office or prevented from acting as director, by reason of the fact that he may also be a director of another company which has entered into any trading contract with the railway company, but he may not vote on any question relating to such contract. ,

Decision of Simonds J. (ante, p. 169) on both points affirmed.

APPEAL from the decision of Simonds J. (1)

The plaintiff, by his statement of claim, which was divided into five parts, claimed that the defendant company was using its powers and spending money in issuing proxies with the names of certain directors inserted, and with stamped covers for their return, and without the indication of any policy of action to support or enforce, together with a letter asking for their return, and that in issuing such proxies stockholders holding less than 2500*l.* stock were ignored, and did not participate in the same privilege to record their vote, and that that was in contravention of ss. 69, 75 and 76 of the Companies Clauses (Consolidation) Act, 1845; and he therefore claimed "an injunction to restrain the company and "the directors from depriving the minority of the special "privileges given to the majority to vote by proxy at the "general meeting at the company's expense . . . ." Further, in part 4 the plaintiff claimed a declaration that directors of the railway company who were also directors and trustees of other incorporated joint stock companies trading directly and indirectly with the railway company were contravening ss. 85 and 86 of the railway company's special Act and were outside the classification of s. 87.

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(1) Ante, p. 169.

The plaintiff made other claims stated in parts 2, 3 and 5 of his statement of claim, the decision on which does not call for and report.

Evidence was given by Mr. G. Royde Smith, assistant secretary of the defendant company, that it was the practice of the company to send out before the general annual meeting to all stockholders holding not less than 2500*l.* worth of stock, stamped proxy forms made out in the directors' names, with stamped and addressed envelopes for their return to the company. The proxy forms were sent in the same envelope with the notice of the meeting and abridged accounts. The object of this was to secure the quorum of votes representing in nominal value 1,000,000*l.* ordinary stock, which was required by the amalgamation scheme of 1923. The witness said that to send out stamped proxy forms to every shareholder would involve very great expense, and if any considerable proportion of them were returned, a great deal of clerical work would be involved in verifying the returns. Unstamped blank proxy forms were, however, sent out along with the notice of the meeting before a " Wharncliffe " meeting to approve any Parliamentary bill which the railway company proposed to introduce.

Simonds J. said it was plain that there was no obligation on the company to send out proxy forms. It was for the company to decide whether it would send out proxies, and it sent out proxies to stockholders holding 2500*l.* of stock or over, and in addition sent to all the stockholders the report and abridged accounts. He could not find that there was any infringement of any statutory provision in sending out stamped proxy forms to stockholders holding at least 2500*l.* worth of stock. The case was not made here that the directors had any sinister object of influencing the voting. The reason why the course complained of was adopted was to secure the necessary quorum of 1,000,000*l.* worth of stock. He was told that the difference in cost between the course pursued and that advocated by the plaintiff would be something like the difference between 250*l.* and 4000*l.*

As regarded the other point raised by the plaintiff, the first answer to it was that it could not properly be decided in the absence of the directors. But he would state his opinion on the question. Sects. 85 and 86 of the Companies Clauses (Consolidation) Act, 1845, were relied on, but he thought the Act contemplated only persons who were concerned in contracts with the company in the sense of having a commercial interest in contracts with the defendant company and excluded them from being directors. If and so far as the commercial interest consisted only in shareholding in a company which entered into contracts with the defendant company, that was safeguarded by s. 87, and the shareholder could be a director of the defendant company. It was immaterial whether in addition to being a shareholder he was also a director of a contracting company. That view was supported by *Lapish* v. *Braithwaite.* (1) This point also failed.

The plaintiff appealed. The appeal was heard on February 28, 1940. The two points were taken separately.

*The appellant* appeared in person and contended on the first point that the procedure of the defendant company was unfair to the majority of the smaller stockholders. If either stamped or unstamped proxies were issued to the stockholders, they ought to be issued to all alike. In this particular case proxies obtained from the stockholders holding 2500*l.* of stock or over were used to defeat proxies stamped and posted by the smaller stockholders at their own expense. It was not every one who knew how to make out proxies, and many were rejected as spoiled. Under s. 64 of the Company Clauses (Consolidation) Act, 1845, all stock conferred the same privileges in respect of voting: see also s. 75. Sect. 76 gave power to vote by proxy. When the proxies were sent out the abridged statements of account were not sent out with them. Votes by proxy were in consequence

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(1) [1926] A. C. 275.

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often given before the accounts were seen. The services rendered by directors to the stockholders should be rendered to them all alike: see *Peel* v. *London and North Western Ry. Co.* (1)

*Charles Harman K.C.* and *Andrewes Uthwatt* for the respondent company were not called upon.

Sir Wilfrid Greene M.R. The appellant on this branch of his appeal is complaining of a practice followed by the respondent company, the London Midland and Scottish Railway Company, in connection with its annual general meetings. For those meetings the company sends out to a certain class of stockholder notice of the meeting, accompanied by a stamped proxy form and a stamped envelope in which it may be returned to the company. Such forms and envelopes are only sent to stockholders holding 2500*l.* worth of stock or more. The complaint that is made by Mr. Wilson, and if he will allow me to say so, he has put his case with great clearness and without repetition, and he has made to my mind perfectly clear what it is that he is contending for—is that the railway company ought to treat all the stockholders alike, that if it sends a proxy form to one it ought to send a proxy form to all; in other words it is a question of all or none. He is not saying that the small shareholders, if I may so call them, are entitled as of right to receive a proxy form at all, or a stamped proxy form. What he is saying is that if the larger stockholders receive those advantages, the smaller stockholders should receive them, too. If that contention were right the exact form of relief which would be founded on it might require consideration. Would it mean that the proxy forms sent out and the proxies given on those forms were invalid, or would it merely mean that the directors of the company must not use the company's funds in sending out proxies to some, although they may indisputably use the company's funds for sending out proxies to all? I need not discuss that question, because

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(1) [1907] 1 Ch. 5, 17.

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in my judgment the principle for which Mr. Wilson contends is one which has no legal foundation.

This is not a case where, for the purpose of a controversy which is going to be discussed and fought at a meeting, the directors select certain classes of shareholders for a special approach with a view to influencing votes, or something of that kind. No consideration of that kind arises in the present case. The reasons why the directors took this course, and do as a matter of practice take this course, are stated in the evidence and in the judgment of the learned judge. There is no suggestion, and indeed there can be no suggestion, of any sinister or improper design on the part of the directors. They have taken this course because they honestly think it is in the best interests of the company and the economical administration of the company's affairs that this system should be adopted. That view of the matter has been accepted by the learned judge, and indeed is not disputed.

The principle for which Mr. Wilson argues is a perfectly dry but quite intelligible principle, that all should be treated alike. I say "intelligible" because it is a thing which would appeal to many people and with considerable reason. But the view which I take upon it is that the contention has no legal foundation. The question whether that course is or is not to be followed, therefore, remains a pure question of the policy of the company. If the company by its directors chooses to take that course, it is a course which, as a matter of law, in the circumstances of the present case, the directors in my judgment are entitled to take. If, as a matter of policy, the stockholders think that that practice ought to be changed, they are entitled if they can to get that policy altered by the ordinary constitutional methods in the company itself, but they have no right to call for assistance from the Courts, because the action of the directors has not infringed any right which those shareholders have, nor has it involved any improper use of the directors' powers or of the company's funds.

In my opinion, therefore, the learned judge was perfectly right in his decision upon this part of the case, and the appeal on this part of the case necessarily fails.

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MacKinnon L.J. I agree.

Clauson L.J. I agree. I think there are to be found in the judgment of Buckley L.J. in *Peel* v. *London and North Western Ry. Co.* (1), some observations which would be quite inconsistent with this case being decided otherwise than it has been decided by Simonds J. The learned Lord Justice says this (2): "The true principle seems to me to be this: "the company may legitimately do and may defray out of "its assets the reasonable expense of doing all such acts "as are reasonably necessary for calling the meeting and "obtaining the best expression of the corporators' views on "the questions to be brought before it. It may, or may not, "be reasonable to pay for stamps upon proxies. I expect "that it is necessary. There are many people who, if they "received a proxy without a stamp, would not take the "trouble to return it. If it is sent with the proxy stamped "and the return postage stamp affixed, very likely it will "come back. Ascertain, as matter of reason and common "sense, is this a reasonable thing to do to get the best expression "of the popular voice? If it is, then it is not ultra vires."

Applying those observations to the present case, it is most important that when the general meeting is convened there should be present at it the necessary quorum, otherwise the holding of the meeting would be abortive and a large amount of expense in advertising and so forth would have been incurred which would be entirely thrown away. One of the first duties of the directors, I should have thought, is to ensure that there should be a quorum present. The quorum happens to be large, perhaps not large as compared with the enormous capital of the respondent company, but still large. What the directors do is to send a stamped proxy to all holders who hold 2500*l.* and upwards. The effect of that is, of course, that a large number of large holders return the proxies and there will be a quorum present. It would, of course, be perfectly possible to send stamped proxies to all the holders, but the expense of that would be very great,

(1) [1907] 1 Ch. 5.

(2) Ibid. 19.

and unless these large holders returned their proxies, there might very well not be a quorum at the meeting. The small stockholders may fill up and return their proxies, but it takes a good many small stockholders of under 2500*l.* to make up the necessary quorum.

I only make these observations to show that what the directors have done seems on the face of it to be perfectly reasonable and a thing which will effectuate that which it is their duty to effectuate, namely, with the least possible expense procure the presence of a quorum. However, the real point is, has their action in doing this been ultra vires?—because unless it is ultra vires the plaintiff cannot complain of it before this Court. If it is only a question as to whether it would be wise to take some other course, whether it be more expedient to send out stamped proxies to all the holders, that is a question which must be a matter for the domestic tribunal at the general meeting to decide and cannot be a matter in which this Court can be called upon to interfere by the plaintiff.

I venture to add these observations, but they are perhaps not strictly necessary, because it appears to me that the grounds upon which the learned judge has based his judgment, and the grounds upon which the Master of the Rolls in his observations has explained why it is the Court feels bound to support it, really cover the whole ground.

I accordingly agree that the appeal on this part of the case fails.

The question in regard to the position of directors of the company who also acted as directors of companies entering into trading contracts with the defendant company was then dealt with.

*The appellant* in person. Directors of the company who are also directors of companies trading with the defendant company are contravening ss. 85 and 86 of the Companies Clauses (Consolidation) Act, 1845, and are outside the protection of s. 87, which expressly excepts shareholders of a company dealing with another company from the disqualification from acting as director of that other company. It is to be noted that directors of such a company are not given the same relief. A person who is paid by both sides is in a position where he cannot fulfil his duty. This case is different from *Lapish* v. *Braithwaite* (1), which related to an alderman of a borough council who was also a shareholder and managing director of companies having current contracts with the borough council. An alderman is unpaid, but a director is paid, and owes a duty to both the companies of which he is director that he cannot perform, because he may not vote on any question as to a contract given by the one company to the other of them. The result is that the director is being paid for duties he does not perform. It ought not to be possible for the directors of the defendant company to be directors of one hundred and forty other companies.

*Charles Harman K.C.* and *Andrewes Uthwatt* for the respondent company were not called upon.

SIR WILFRID GREENE M.R. On this point also Mr. Wilson has put his case clearly and with moderation, but the learned judge's judgment upon it is one which, in my opinion, is perfectly right, both as regards its conclusion and as regards the reasons upon which that conclusion is founded.

Mr. Wilson has put before us a number of considerations which he suggests make it undesirable that the position of which he complains should continue. It is not the business of this Court to consider questions of policy; it is the business of this Court to administer the law. Whether or not within the four corners of what the law permits one or other alternative policy is preferable is something with which this Court has no concern. Provided those who are governing a public company are doing what the law tells them to do and are not doing what the law forbids them to do, the other matters as to the method of running the company's affairs are matters of policy which must be determined by the ordinary internal machinery of the company without the

(1) [1926] A. C. 275.

interference of these Courts. If Mr. Wilson thinks that the policy followed by this company is not a good one, he must endeavour if he can to get that policy changed. It is not for us to express any view whatever; it is not within our competence. I simply say that in order that he may appreciate (and I am quite sure he will appreciate because he understands the case very well) the difference between what is legally permitted or legally forbidden, and what is a pure matter of policy with which the Courts are not concerned. The matters in which he is particularly interested under this head, having regard to the decision of Simonds J., which is affirmed by this Court, remain purely as matters of policy. Therefore we can neither deal with them nor express any opinion upon them. This part of the appeal, therefore, must also fail.

MACKINNON L.J. I agree.

CLAUSON L.J. I agree.

Solicitor: *Alexander Eddy.*

H. C. G.

FARWELL
J.

1940

Jan. 17, 18,
24.

# *In re* FAWCETT.

# PUBLIC TRUSTEE *v.* DUGDALE.

[1938. F. 1878.]

*Administration—Will—Settlement of residuary estate—Trust to invest—Estate comprising unauthorized investments—Rights of persons interested respectively in capital and income.*

A testatrix bequeathed her residuary estate, which comprised several investments not authorized by law for the investment of trust funds, to trustees in trust to invest it, to divide the income thereof equally among certain persons and after their death to divide it equally among their children. There was no express power to postpone the sale of the unauthorized investments:—

*Held*, (1.) that there was a trust for sale as to the unauthorized investments and that the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137 should be applied with reference to the residuary estate as between capital and income;

(2.) that in the case of unauthorized investments retained unsold at the end of one year from the death of the testatrix, the life tenants were entitled to receive interest at the rate of 4 per cent. per annum from her death till realization, on their value taken one year after her death;

(3.) that in the case of unauthorized investments realized during the year following the death of the testatrix, the life tenants were entitled to receive that interest on ~~the net proceeds~~ of the realization from the date of her death to the date of completion;

(4.) that the unauthorized investments for the time being unsold should be taken en bloc as one aggregate for the purposes of the rule in *Howe* v. *Lord Dartmouth* 7 Ves. 137, and that in applying that rule the Apportionment Act, 1870, should not be applied in the income accounts at the death of the testatrix or at the beginning or end of any accounting period with reference to the income of unauthorized investments;

(5.) that any excess of income from unauthorized investments beyond the interest payable to the life tenants in respect of them should be invested in authorized investments, the subsequent income of this invested excess being payable as income;

(6.) that the interest in respect of the unauthorized investments was payable out of the income arising from them or, so far as that was insufficient, out of the proceeds of their realization, and that any such interest for the time being in arrear was payable, calculated at simple interest, out of subsequent income from unauthorized investments, which were for the time being retained, and out of the proceeds of their sale when realized;

(7.) that no excess income from unauthorized investments, which at the end of any accounting period were available for investment in authorized investments, and no proceeds of realization of unauthorized investments not required at the date of realization to pay interest for the time being in arrear and accordingly available for investment in authorized investments, were applicable towards payment of interest subsequently accruing in respect of unauthorized investments still retained.

ADJOURNED SUMMONS.

By her will dated December 26, 1933, the testatrix, Eleanor Jane Fawcett, who died on January 4, 1934, bequeathed certain legacies and gave the following direction: "The "residue of my estate as follows: Upon trust to pay each of "my nephews and niece the children of my late sister Beatrice "Mary Dugdale the legacy of 1250*l.* each, and the balance of "my estate to be invested and the income thereof to be "divided equally between and amongst my said nephews and "niece for their respective lives and after their death equally "amongst their lawful children (principal and capital) on their "attaining twenty-one years of age and if any of my said "nephews and niece shall die without leaving lawful issue, "the share or interest of such deceased child shall be divided "equally amongst the surviving nephews and niece who "shall then be living." Five nephews and one niece were beneficiaries under this clause.

At the death of the testatrix her estate comprised a considerable number of investments which were not investments authorized by law for the investment of trust funds. During the first year after her death some were sold, while others remained unsold.

On December 1, 1938, the Public Trustee, the plaintiff, who was then the sole trustee of the will, took out a summons to determine the following questions:—

"(1.) Whether on the true construction of the said will "of the said testatrix the rule in *Howe* v. *Lord Dartmouth* (1) "ought to have been and to be applied in reference to the "residuary estate as between capital and income. (2.) If "such rule applies then that it may be determined whether "(*a*) in the case of unauthorised investments still retained

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(1) (1802) 7 Ves. 137.

"unsold at the end of a year from the death of the testatrix, "the life tenants were and are entitled to interest at the rate "of 4 per cent. per annum or at some and what other rate "calculated on the value of such investments taken at the end "of such year and whether such interest should commence "from the date of the death and run on until the realisation of "such investments respectively ; (*b*) in the case of unauthorised "investments realised during the first year from the death of "the testatrix the life tenants are entitled to interest as "aforesaid on the net proceeds of such realisations respectively "from the date of death down to the respective dates of the "completions of such realisations . . . . ; (*c*) the unauthorised "investments for the time being unsold ought to be taken "en bloc as one aggregate for the purpose of the rule or each "such investment ought to be taken separately ; (*d*) the "Apportionment Act, 1870, ought to be applied in the income "accounts at the death of the testatrix and the beginning and "end of each year from the death, or only at the date of the "death ; (*e*) in the event of interest calculated as aforesaid "exceeding the actual income of the unauthorised investments "or investment . . . . the life tenants are entitled to such "excess interest or not and if they are so entitled, whether such "excess is payable out of the capital of the estate or only out "of any excess of actual income over interest in future or "past years . . . . ; (*f*) any excess of income from unauthorised "investments beyond the interest payable in respect thereof "to the life tenant ought to be invested as capital and the "whole of the actual future income thereof is payable as "income ; (*g*) under head (*a*) aforesaid the calculation of "interest ought to continue upon the value of an investment "as at the expiration of a year from the death until the same "is realised, notwithstanding that the value of such investment "may subsequently greatly depreciate or appreciate, or whether "the values of the investments ought to be ascertained at the "end of each year or at some and what other intervals and "whether such interest continues in respect of an investment "until the same is actually sold notwithstanding that the "investment becomes valueless or unrealisable."

*Wilfrid Hunt* for the plaintiff.

*Tonge* for the remaindermen. The tenants for life are entitled from the death of the testatrix to interest on the value of the unauthorized investments en bloc: *In re Owen. Slater* v. *Owen.* (1) The interest was payable on the value of those investments as at one year from the death of the testatrix or on the net proceeds of sale if they were sold within the year. It was payable only out of the actual dividends in each year after applying the Apportionment Act, 1870, at the death of the testatrix and at the end of each year. The Act must be applied at the death of the testatrix before the rule in *Howe* v. *Lord Dartmouth.* (2) There is no right to resort to capital if the dividends in any year are deficient. The tenants for life should not get more under the rule than they would get if it did not apply. In a case within the rule the rate of interest should be based on the price of Consols: *In re Wareham. Wareham* v. *Brewin.* (3) The rule in *Howe* v. *Lord Dartmouth* (2) is really one branch of two rules. On the one hand unauthorized investments and wasting property must be converted so as to give the tenant for life and the remainderman an equal chance of enjoyment. The inverse rule, exemplified in the case of *In re Earl of Chesterfield's Trusts* (4), aims at giving the tenant for life some part of the enjoyment of property which will not produce income for a long time ahead.

*Droop* for the tenants for life. Under the will the income of the unauthorized investments is not income of the residue. These investments and their income form part of the estate as one mass and the tenants for life are entitled to be paid what they are entitled to under the rule in *Howe* v. *Lord Dartmouth* (2) out of anything available in cash representing them for the time being; the whole of the dividends are available. Accordingly there could be no apportionment of dividends either at the death of the testatrix or at any other time. This point was not taken in the case of *In re Owen.* (1) Under the equitable rule the tenants for life were entitled from the death of the testatrix to interest either on the value of the unauthorized investments taken, since there was no power to retain, at a year after her death, when conversion should have taken place or, if they were sold within the year, to interest on the amount of the actual proceeds of sale till the date of realization. The interest may be 4 per cent. per annum or at a rate based on the price of Consols. In recent years the former has generally been taken. The investments should be aggregated for valuation and all dividends treated together : *In re Owen.* (1) If the dividends produce more than the rate allowed the balance should be invested as capital and so equitably apportioned. The balance so invested ceases to be part of the mass of unauthorized investments and their dividends.

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(1) [1912] 1 Ch. 519.
(2) 7 Ves. 137.
(3) [1912] 2 Ch. 312.
(4) (1883) 24 Ch. D. 643.

If the dividends produce less than the rate allowed the tenants for life are entitled to be recouped out of the investments. But they may not be entitled to be paid until proceeds are available : *Taylor* v. *Clark.* (2) The rule in *In re Earl of Chesterfield's Trusts* (3) applies to income-bearing investments which produced no income : *Beavan* v. *Beavan.* (4) The tenants for life should be entitled, when an investment is realized, to a payment in respect of unpaid interest on the footing of that rule.

*Cur. adv. vult.*

1940. Jan. 24. FARWELL J. [having stated the facts :] The rule in *Howe* v. *Lord Dartmouth* (5) is founded on the judgment of Lord Eldon L.C. in the case of that name. It was made for the purpose of holding, as far as possible, an even hand between those whose interests are in capital and those whose interests are in income, in respect of investments which are not authorized by law for the investment of trust funds. In the present case, so far as the construction of this will is concerned, it is, I think, clear that there is a trust for sale so far as the unauthorized investments are concerned. There is no express trust for sale but there is a trust to invest and that must mean to invest in trustee securities. Accordingly there is an implied trust for sale of any investments which are not authorized by law for the investment of trust funds. It is also to be noticed that there is no power to postpone the sale in question. The rule in *Howe* v. *Lord Dartmouth* (1), in my judgment, was based upon the equitable idea of treating that which ought to be done as having been done, and accordingly in the early cases the general rule was that the tenant for life was entitled to whatever the investments, if they were sold and re-invested in Consols, would produce. To that extent, and to that extent only, he was entitled to payment on account of income. In more recent years the practice has generally been to give to the tenant for life interest at 4 per cent. upon the capital value of the unauthorized investments. The reason for the alteration in the rule was, I think, due to the fact that the range of authorized investments has been very greatly extended in comparatively recent years, and accordingly the Court took the view that a rate of interest which might be higher than that which was produced by Consols would be a reasonable rate to allow to tenants for life, since there was, at any rate, some possibility that trust funds could be invested in securities returning such income. The general, although not the universal, rule is now to allow 4 per cent., and I see no reason in the present case to depart from that modern practice. In order to give effect to the rule it appears to me that in a case of this kind it is the duty of the trustees to have the unauthorized investments valued as at the end of the first year after the testatrix's death. During that year the executors are given time to deal with the estate as a whole. At the end of it comes the time when, in my judgment, any unauthorized investments which they still retain should be valued and the tenant for life becomes entitled to be paid 4 per cent. on the valuation of the whole of the unauthorized investments. To that extent these tenants for life are entitled to receive income in each year and that income, 4 per cent. on the capital value of the unauthorized investments, must be paid out of the actual income received from the unauthorized investments; that is to say, the trustees will receive the whole of the

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(1) [1912] 1 Ch. 519.
(2) (1841) 1 Ha. 161, 170.
(3) 24 Ch. D. 643.
(4) (1869) 24 Ch. D. 649*n.*
(5) 7 Ves. 137.

(1) 7 Ves. 137.

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dividends which the unauthorized investments pay and there will be no apportionment. Those dividends will be applied in the first instance in paying, so far as they go, 4 per cent. on the capital value of the unauthorized investments. If the income received on the unauthorized investments is more than sufficient to pay the 4 per cent., then the balance will be added to the capital and it will form part of the whole fund in the hands of the trustees. If, on the other hand, the income actually received from the unauthorized investments is not sufficient to pay 4 per cent. in each year to the tenants for life, they will not be entitled to immediate recoupment out of the capital, but when the unauthorized investments are sold the trustees will then have in their hands a fund representing the proceeds of sale of the unauthorized investments, together with any surplus income which may have accrued in the earlier years; out of those proceeds of sale the tenants for life will be entitled to be recouped so as to provide them with the full 4 per cent. during the whole period and they will be entitled to be refunded the deficit calculated at 4 per cent. simple interest but less tax. In that way it appears to me the rule can be worked out satisfactorily as between capital and income and the balance will be held as evenly as possible between those two opposing interests. No doubt the duty of the trustees is to realize the unauthorized securities as soon as conveniently may be, but until that has been done that, in my view, is the right way of dealing with the matter. The fact that there may be some investments which are of little or no value and which produce no income does not affect the position if the whole of the unauthorized investments are treated as one whole, and the value of the whole of those investments is ascertained and the income received from the whole of those investments is received by the trustees and applied in the way which I have stated.

That being the general principle upon which, in my view, the trustees should act in this case, I think the questions raised in the summons can be answered without much difficulty.

I should add this. It must be observed that in the present case, as I have already pointed out, there is no power to postpone the sale, and the judgment which I have given does not necessarily apply in a case where there is an express power to postpone; other considerations may arise in such a case, but where there is no power to postpone and there is a trust for sale and re-investment in trustee securities the judgment which I have given indicates the right way in which the administration of the estate should be proceeded with.

Accordingly I will make a declaration, in answer to question 1 of the summons, that on the true construction of the will of the testatrix there was and is a trust for sale as to all unauthorized investments and that the rule in *Howe* v. *Lord Dartmouth* (1) ought to have been and ought to be applied with reference to her residuary estate as between capital and income.

In answer to question 2 of the summons I will make a declaration that (*a*) in the case of unauthorized investments which were still retained unsold at the end of one year from the death of the testatrix the life tenants were and are entitled to interest at the rate of 4 per cent. per annum on the value of such investments taken at the end of such year but commencing from the date of the death and running on until the realization of such investments respectively; (*b*) in the case of unauthorized investments realized during the first year after the death of the testatrix the life tenants are entitled to interest at the rate aforesaid on the net proceeds of such realization respectively from the date of the death down to the respective dates of completions of such realizations; (*c*) the unauthorized investments for the time being unsold ought to be taken en bloc as one aggregate for the purposes of the rule in *Howe* v. *Lord Dartmouth* (1); (*d*) in applying that rule the Apportionment Act, 1870, ought not to be applied in the income accounts at the death of the testatrix or at the beginning or end of any accounting period with reference to the income of unauthorized investments; (*e*) any excess of income from unauthorized investments beyond the interest payable in respect of such investments to the life tenants ought to be invested in

(1) 7 Ves. 137.

authorized investments as part of the capital with the other authorized investments, and accordingly the whole of the actual subsequent income of such invested excess income is payable as income; (*f*) the interest so payable in respect of unauthorized investments was and is payable out of moneys being income from unauthorized investments or, so far as such income is insufficient, being proceeds of realization of such investments, and any interest so payable for the time being in arrear is payable (but calculated as simple interest only) out of subsequent income from unauthorized investments which are for the time being retained and out of the proceeds of sale of such investments as and when realized, but neither any excess income from unauthorized investments, which at the end of any accounting period is available under head (*e*) for investment in authorized investments, nor any proceeds of realization of unauthorized investments not required at the date of realization to pay interest payable as aforesaid for the time being in arrear and accordingly available to be invested in authorized investments, were or are applicable towards payment of subsequently accruing interest as aforesaid in respect of unauthorized investments then still retained.

Solicitors: *Hamlins, Grammer & Hamlin, for Wade, Kitson & Rigg, Leeds*; *Hedley Norris & Co., for Bickers, Peters & Heap, York.*

F. C.

# *In re* WELLS' WILL TRUSTS.

SIMONDS
J.

1940
Feb. 29.

# PUBLIC TRUSTEE *v.* WELLS.

[1940. W. 389.]

*Will—Construction—Annuity—Direction to pay free of all deductions—No inclusion of income tax as a deduction.*

An annuity directed to be paid free of all deductions is not payable free of income tax, unless there is a context in the will clearly expressing the intention of the testator that any such deductions are to include income tax.

*In re Cowlishaw* [1939] Ch. 654 doubted and distinguished.

SUMMONS.

The testator, John Isaac Wells, by his will dated October 9, 1917, appointed the Public Trustee as executor and trustee thereof and bequeathed certain annuities free of duties to commence from the date of his death. One of these annuities was 350*l.* to his wife during her life or widowhood " to be paid "free of all deductions by equal quarterly payments." Other annuities were also given free of all deductions. Subject to these annuities the testator left the residue of the income of his estate to his son John Duncan Wells during his life, and after his death the capital was to be divided among his son's children. The testator died on November 21, 1918. The Public Trustee paid the annuity of 350*l.* to the widow, after deduction of income tax, but the decision in *In re Cowlishaw* (1) suggested a doubt whether that procedure was correct. The widow now claimed that she was entitled to her annuity free of tax, and this summons was taken out to have the question decided.

*Wilfrid Hunt* for the plaintiff. The present case appears to be practically indistinguishable from *In re Cowlishaw* (1), but for one circumstance. When this will came into operation, the Public Trustee's income fee would have been deducted from the annuity before payment but for the words " free of

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(1) [1939] Ch. 654.

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"all deductions," in accordance with the decision in *In re Bentley.* (1) But in *In re Riddell* (2) it was decided that the annual income fee was a testamentary expense. Until that decision it was a deduction to which the direction in the will would apply. There was no deduction, apart from income tax, in *In re Cowlishaw.* (3)

*J. A. Plowman* for the testator's widow. The decision in *In re Cowlishaw* (3) exactly applies, and should be followed.

*C. L. Fawell.* The decision in *In re Cowlishaw* (3) is not in accordance with the authorities, which have decided that a direction to pay an annuity " clear " or " free of all deductions " does not mean that it is to be paid free of income tax, unless income tax or " taxes " are expressly mentioned. The earliest case in which the rule is stated is *Wall* v. *Wall.* (4) Other authorities which have confirmed the rule are *Lethbridge* v. *Thurlow* (5), *Sadler* v. *Rickards* (6), *Turner* v. *Mullineux* (7), *Festing* v. *Taylor* (8), *Abadam* v. *Abadam* (9), where the words were " without any deductions whatsoever," *Gleadow* v. *Leetham* (10), *In re Saillard* (11), and *In re Loveless* (12), where the rule, and the reasons for it, were clearly explained by Swinfen Eady J. The case of *In re Shrewsbury Estate Acts* (13) referred to in *In re Cowlishaw* (3) was an exception to the general rule. In *In re Shepherd* (14) before Peterson J. and the Court of Appeal, almost exactly the same direction as in this will was held not to free the annuity from income tax.

He also referred to *In re Bentley* (1) and *In re Riddell.* (2)

SIMONDS J. In this case the testator, John Isaac Wells, died in the month of November, 1918, having made his will on October 9, 1917. The single question which arises for my decision on the construction of his will is the familiar one whether an annuity thereby given to his widow is on the

(1) [1914] 2 Ch. 456.
(2) [1936] Ch. 747.
(3) [1939] Ch. 654.
(4) (1847) 15 Sim. 513.
(5) (1851) 15 Beav. 334.
(6) (1858) 4 K. & J. 302.
(7) (1861) 1 J. & H. 334.
(8) (1862) 3 B. & S. 217.
(9) (1864) 33 Beav. 475.
(10) (1882) 22 Ch. D. 269.
(11) [1917] 2 Ch. 401.
(12) [1918] 2 Ch. 1.
(13) [1924] 1 Ch. 315.
(14) (1920) Unreported.

true construction of the will given free of income tax. The gift is in these terms: "I bequeath the following annuities "free of duties to commence from the date of my death: "to my said wife an annuity of 350*l.* during her life or "widowhood to be paid free of all deductions by equal "quarterly payments, the first shall be paid three months after "my death." He then goes on to give other annuities in similar terms which are not material for the purpose of this decision.

From a long line of authority stretching from *Lethbridge* v. *Thurlow* (1) and including *Sadler* v. *Rickards* (2), *Gleadow* v. *Leetham* (3), and the more recent cases in the Court of Appeal, *In re Saillard* (4) and *In re Loveless* (5), I should have had no doubt whatever that on the terms of this will the annuity is not given free of income tax. There is no case among all those which have been cited to me where an annuity had been stated to be free of income tax unless there was clearly expressed on the face of the will an intention of the testator that, when he referred to freedom from deductions, he was including income tax.

In *In re Cowlishaw* (6), which recently came before Bennett J., the words of the will which he there had to construe bear, it must be said, a remarkably close resemblance to those of the will which I have to construe. He came to the conclusion that there the annuity was given "free of income tax." The great respect which I bear for that learned judge would, I think, have prevented me from putting a different construction on this will but for two circumstances. First, it appears from the report that the learned judge did not have the advantage of having cited to him a large number of authorities which Mr. Fawell has cited to me, and, in particular, *In re Shepherd* (7), which came before Peterson J. and the Court of Appeal for construction in the year 1920. In that case (as in *In re Cowlishaw* (6), and in the case which I have to determine), there were two features—a direction that the

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(1) 15 Beav. 334.
(2) 4 K. & J. 302.
(3) (1882) 22 Ch. D. 269.
(4) [1917] 2 Ch. 401.
(5) [1918] 2 Ch. 1.
(6) [1939] Ch. 654.
(7) Unreported.

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annuity should be free of all duties, and then a direction that the annuity should be paid "free of all deductions "whatsoever." Nevertheless, the Court of Appeal, affirming Peterson J., came to the conclusion that the annuity was not payable free of tax.

Secondly, in addition to those authorities which were not called to the attention of Bennett J., I have here this distinguishing feature. The trustee appointed by the will is the Public Trustee, and accordingly the fees payable to the Public Trustee are payable under the statute. At the date when this will was made it had been decided by Astbury J. in 1914 that the Public Trustee's income fee, which may be regarded as payable in respect of an annuity given by will, is properly payable out of the annuity. Accordingly, at the date when this testator made his will and thereby appointed the Public Trustee to be his trustee there was a deduction which, according to the law as it then stood, was payable out of the annuity which he gave. It is therefore proper to assume that the testator, when he gave an annuity free of duties and then "free of all "deductions whatsoever," may have had in his mind the deduction which, as the law then stood, would have been made from the annuity. It would be wrong, therefore, in this case to say, as Bennett J. found himself constrained to say in *In re Cowlishaw* (1), that no other meaning could be given to the words "free of all deductions."

Accordingly, there is a distinguishing feature in the present case which justifies me in saying that I need not follow the decision of Bennett J. in *In re Cowlishaw* (1), and I declare that the annuity was not given "free of income tax."

Solicitors: *Minor & Co., Manchester; Grundy, Kershaw, Farrar & Co., Manchester, for E. C. Kilsby & Son.*

(1) [1939] Ch. 654.

H. L. L.

# REDDITCH BENEFIT BUILDING SOCIETY *v.* ROBERTS.

C. A.

1940

*Jan.* 24, 25.

[1839. R. 1839.]

*Practice—Default of appearance—Defendant before Court and anxious to defend—Judgment not to go against defendant for default—Mortgage—Enforcement of—Should be by originating summons and not by action—Where action brought, procedure should be followed which gives defendant equitable protection—R. S. C., Order* LV., *rr.* 5A, 8A; *Appendix* L., *Forms* 38–40.

The Court should not allow a plaintiff to enter judgment against a defendant for default of appearance when the defendant, whether he has technically appeared or not, is personally or by his legal representative before the Court and anxious to put himself in a position to defend the action.

Under the present practice, proceedings for enforcing a mortgage should not be by action, but by originating summons in the Chancery Division under R. S. C., Order LV., r. 5A; but where such proceedings have been commenced by action, then, with a view to giving the defendant the same equitable protection, in case of an application for summary judgment and in all other respects, as he would have had if the proceedings had been by originating summons, the procedure prescribed by R. S. C., Order LV., r. 8A, and Appendix L., Forms 38–40, ought to be followed.

APPEAL from the judgment of Hallett J.

On June 22, 1939, the Redditch Benefit Building Society of Redditch, in the county of Worcester (hereinafter called "the "plaintiffs"), issued a writ in the High Court of Justice, Chancery Division, Birmingham District Registry, against Walter Arthur George Roberts, who resided in Middlesex (hereinafter called "the defendant"), alleging that the defendant had made a mortgage to them of a house, No. 7, Balmoral Drive, Hayes, Middlesex, and claiming payment of the sum of 446*l.* 18*s.* 2*d.* in respect of the money advanced, and other items, and possession of the house.

On June 24, 1939, the writ was served on the defendant personally.

On August 12, 1939, a certificate was obtained from Birmingham District Registry that no appearance to the writ had been entered for the defendant.

On August 12, 1939, the plaintiffs' solicitors posted to the defendant a letter of that date informing him that they would on August 25, 1939, make an application to the district registrar for leave to enter judgment in default of appearance against him under R. S. C., Order XIII.

It was stated that on the last-mentioned date the plaintiffs' solicitor attended at the district registry to enter appearance for the defendant, but that the clerk would not accept the appearance at so late a stage without leave of the registrar. The plaintiffs' solicitor then attended at the hearing of the application, but the registrar declined to allow him to enter the appearance, or to grant an adjournment, and made an order giving the plaintiffs leave to sign judgment on their claim for payment and possession against the defendant, execution to be suspended till August 29, and judgment was signed accordingly.

On August 30, 1939, in the vacation Court, the defendant obtained from Cassels J. leave to apply for an order to set aside the judgment so entered against him.

Pursuant to that leave the defendant gave notice of motion dated September 9, 1939, to set aside that judgment on the grounds: (1.) that the district registrar was wrong in holding that the defendant had failed to enter an appearance to the writ; and (2.) that the defendant had a valid defence to the action on the merits.

On September 20, 1939, in the vacation Court, the motion was heard by Hallett J., who dismissed it with costs.

The defendant gave notice of appeal to the Court of Appeal dated October 31, 1939, for an order that the judgment of Hallett J. might be reversed and that judgment on the motion might be entered for the defendant against the plaintiffs on the grounds: (1.) that that judgment was wrong in law; and (2.) that the learned judge misdirected himself on the issue whether the defendant had entered a valid appearance to the writ. The appeal was heard on January 24, 25, 1940.

*G. Granville Slack* for the appellant.
*Herbert Hart* for the respondents.

SCOTT L.J. I will ask Clauson L.J. to deliver the judgment of the Court (CLAUSON L.J., LUXMOORE J., and myself) which we have considered subject to the additional matters that we have heard now from Mr. Hart.

CLAUSON L.J. This is a most unfortunate case, in which, as sometimes happens, a series of blunders, each quite explicable, might have resulted in serious injustice being done, but we are glad to think that, with the assistance of counsel and the learned registrar of the district registry in which the matter originated, it is possible to deal with it in such a way that no evil consequences will ensue.

The plaintiffs as mortgagees issued a writ in the Birmingham District Registry claiming repayment of a sum of between 400*l.* and 500*l.* for principal and interest of the mortgage money, and other items, and possession, against the defendant, living in Middlesex, who had executed an ordinary building society mortgage, as indeed they were entitled to do as the rules at present stand. The writ was served in the usual way; the time for appearance expired without the defendant having entered an appearance, and in due course the plaintiffs proceeded with the usual application for leave to have judgment for payment and possession. I say the "usual application," because, as the rules now stand and have stood for nearly three years, in an action of this kind judgment in default of appearance cannot be entered without the leave of the master, and, of course, in the district registry, of the district registrar.

For reasons which are not material, the defendant had, as I say, not entered appearance within the time prescribed, but he did receive notice, as is now required by the rules, that this application for leave to enter judgment in default of appearance was coming before the district registrar on a certain day. On the morning of that day he attended at the office. Here I use language as neutral as I can, because I do not know that the facts are completely ascertained. He made some attempt in the office to enter an appearance. We were told that the clerk refused to enter the appearance on the ground that the number of days stated in the writ had expired.

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I think that was probably due to some misunderstanding, but what probably happened was that the clerk said: " There is "a summons before the registrar which he is going to hear in "a few minutes. He may be hearing it now upstairs. I "cannot enter appearance for you in these circumstances. "Go up and put the matter before the registrar."

We have had the advantage of hearing from the registrar what happened, and it appears that when the summons was before him the defendant's representative did appear and intimate his desire to put himself in order in regard to entering an appearance with a view to avoiding judgment going by default and with a view in due course, no doubt, to obtaining time to put in a defence, and so forth. I should gather that the representative of the defendant was perhaps not very much versed in all the technical details of Chancery procedure. It is not necessary to consider exactly what was said on one side or the other. What seems to have happened is that the learned registrar thought that the best thing that could be done would be for the defendant's representative to ascertain from his client what was the real defence to the action, or in other words the real point he was going to fight about. The learned registrar thought the most convenient way of dealing with that matter was to give judgment in default but to suspend it for a time—whether seven or fourteen days is not quite clear and is quite immaterial—on the understanding, apparently, that the defendant's representative was to get instructions, and, if he got instructions which satisfied him that there really was some question to fight about and that it ought to be fought, he would then take some step, either by mentioning the matter to the registrar or by applying for extension of time to put in a defence, or whatever might turn out to be the right procedure, to get things in order so that the defendant could put in his defence.

It was for that reason that the learned registrar let judgment go as in default of appearance, notwithstanding that as a matter of fact there was before him a representative of the defendant who was anxious to put himself right with the Court by entering an appearance. The learned registrar, I think, made the order which he did make with the best intention, regarding it as a practical way of bringing the thing to a head but in my opinion it was not the right order to make, because a judgment ought never to go in default of appearance when the defendant, whether he has technically appeared or not, is before the Court and anxious to put himself in a position to defend. I think it was quite wrong to enter the judgment as a judgment in default of appearance. In the normal way I do not know that it would have mattered very much, and, as I say, I think the learned registrar was actuated by a most commendable wish to get the thing on to a practical footing, so that if there really were no defence, no further expense would be incurred by the defendant, while, if there were a defence, having regard to the fact that the order was suspended for seven days or a fortnight, there was every opportunity of getting things straight. But we take the view that that order entered under those circumstances is an irregular order because it proceeds on default of appearance which is not in accord with the fact that the defendant by his representative was before the Court attempting to put himself in a position to defend. Accordingly, we see no ground upon which that order can be supported, and it must be discharged.

It appears that there was a motion before the vacation judge, Hallett J., to discharge the registrar's order. Unfortunately, the counsel who moved the motion is not now before the Court, and Mr. Hart, who appeared for the respondent to the motion, apparently, owing to other engagements, did not reach the vacation Court until a moment when matters had already proceeded a certain way, and some obscurity, I think, still lurks round the reasons which induced Hallett J. to leave the order standing. I do not think it can have been put to him in the way that we envisage, namely, that it was a case in which judgment was allowed to go in default of appearance when there was not really default. However that may be, he refused to interfere with the learned registrar's order, and the matter now comes before us on appeal from his decision.

When the matter came before us and we proceeded to investigate it, another feature of a somewhat alarming character emerged. In order to explain that I must go back historically for about three years. Until about three years ago there were two methods of enforcing mortgages of this character. One was by originating summons in the Chancery Division in London, but that procedure did not apply in the ordinary district registry. I say " ordinary " because I omit Liverpool and Manchester. There was also the procedure of issuing a writ claiming the appropriate relief and obtaining, usually in the King's Bench Division, a judgment for payment or possession, either in default or under the appropriate rules dealing with summary applications for judgment.

Those whose business it is to see that the procedure of the Court is in accordance with what is right and proper were rather perturbed by finding that, whereas on originating summons the facts and the circumstances of the case were brought before the Court, and in proper cases the wind was tempered to the shorn lamb, time being given for payment and so forth, in cases where relief was claimed by the issue of a writ in the King's Bench Division the relief was obtained automatically without the matter coming before any judicial officer. Further than that, it had been the practice—a practice which dates back to the period before the Judicature Act—of giving the judgment in the form appropriate in the courts of common law, which had no regard in this matter to the equitable principles governing the relations of mortgagor and mortgagee, but was a clean judgment for payment and possession, in the form that was in use before the Judicature Act, leaving it to the defendant, by appropriate proceedings in equity, to establish the rights which would flow from his action if he in fact paid the debt. Accordingly, a defendant who found himself served with a judgment of that kind would, on the face of it, see that he was under an obligation to give up possession and to pay, and, at all events, would not have it brought to his attention that, upon payment, he would by taking the proper proceedings in the proper Court be entitled to a certain relief in respect of his position as a mortgagor.

It was for that reason that, about three years ago, by

Rules of Court it was laid down that certain forms of order were to be used in the case of orders made on originating summons for relief of such character as is usually required in the case of mortgages of this type, and also for the first time that the jurisdiction on originating summons should be extended so as to enable the Court on the originating summons not only to give the usual equitable relief but also judgment for payment of the debt. That step had the result that all the rights of a mortgagee under a mortgage of this kind could be dealt with on originating summons.

Further, at the same time, it was thought convenient that the method of obtaining judgment automatically, if I may so express it, when a writ had been issued in the King's Bench Division, ought not to continue, and it was decided to make arrangements so that all actions of this type should be brought not in the King's Bench Division but in the Chancery Division, and that where an action had been commenced by writ the defendant should be given the same protection in the case of an application for summary judgment in the action commenced by writ as he would be entitled to if the application were made by originating summons; and in particular a rule was made, namely, r. 8A, of Order LV., under which, in the case of an action commenced by writ, the forms of order in R. S. C., Appendix L., Nos. 38, 39 and 40, which were prescribed for the originating summons procedure, should be used in the case of actions commenced by writ.

In this particular case when we went into the matter we found that the judgment that had been given in default of appearance was not in the form which complied with the rules, but was in the old pre-Judicature Act form, directing simply payment and possession. We have with the registrar inquired into the matter, and we have had information properly given on behalf of the plaintiffs by their counsel, and it seems pretty clear that there has been, as I say, an unfortunate series of blunders.

The district registrar ought never to have allowed the order to go in the form in which it did go; and the mistake appears to have been due not so much to the fact that the district registrar was ignorant of the rules and the forms, as to the fact that the necessary information regarding the right form to use somehow did not seem to have found its way to the clerk in the registry whose business it is to check the order. It would also appear that there had been some misunderstanding in some previous case about the form of order. That was suggested to us by the counsel for the building society, and I have not the least doubt that the suggestion was not made without some foundation. But the blunder, if blunder it was, was certainly not made by the district registrar whom we have with us now, but another district registrar. It would be unfair to say anything further about it without investigating the circumstances, and I do not think it is worth doing so.

The fact remains that a blunder was made in allowing the order to go in the form in which it did; and, accordingly, on that ground, too, even if there had not been the difficulty as to the order being in default of appearance where a defendant had bona fide tried to appear, we should have found it necessary to discharge the order, if only on the ground that it does not comply in its form with the rules.

Accordingly, the order which we propose to make is this: the order of the vacation judge refusing to interfere with the order of the district registrar will be discharged. The judgment in default of appearance made by the district registrar will also be discharged. It will not be necessary to intimate that leave is given to the defendant to enter an appearance. If he has not already done so (it may be that he has: I do not know), he will, of course, in the ordinary way do so. Anyway, he will find no difficulty this time in getting his appearance accepted. I think there must be an undertaking by counsel for the defendant to enter appearance, because it is on that footing that he is before the Court.

*Granville Slack.* Certainly. That undertaking is given.

*Herbert Hart.* Will that be an appearance in London?

[Their Lordships conferred as to the place where appearance should be entered.]

CLAUSON L.J. We have had the assistance of the learned registrar. It appears that the most convenient course will be for you to enter an appearance in Birmingham with a request that the proceedings be transferred to London. Then they will be as a matter of course transferred forthwith.

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*Appeal allowed.*

Solicitors for appellant: *Stanley Moore & Partners.*

Solicitors for respondents: *Long & Gardiner, for Wragge & Co., Birmingham, for Kerwood, Hobson, Thomas & Co., Redditch.*

J. R.

C. A.

1940

Feb. 14.

## *In re* BIRCHALL.

## *In re* VALENTINE.

## KENNEDY *v.* BIRCHALL.

*Will—Construction—Gift to children in equal shares—Proviso that, if any child " shall " die in lifetime of testatrix leaving children who attain twenty-one, such children to take their parent's share—Child of testatrix already dead before date of her will but leaving children who have attained twenty-one—Whether such children entitled to share of her estate.*

By her will dated June 3, 1937, a testatrix directed that her trustees should stand possessed of her trust estate for all her children (except B. B. otherwise provided for) living at her death in equal shares " Provided always that, if any child of mine "(except the said B. B.) shall die in my lifetime leaving a child or "children living at my death who being male attain the age of "21 years or being female attain that age or marry then and in "every such case such last mentioned child or children shall take "(and if more than one equally between them) the share which "his, her, or their parent would have taken in my trust estate if "such parent had survived me." The testatrix died on March 11, 1938. W. H. B., a son of the testatrix, had died on September 20, 1917, leaving three children who were all living at the death of the testatrix and had all attained the age of twenty-one :—

*Held*, that, notwithstanding that W. H. B. was already dead at the date of the will, his three children were entitled to share in her trust estate.

*In re Lambert. Corns* v. *Harrison* [1908] 2 Ch. 117 ; *Barraclough* v. *Cooper* [1908] 2 Ch. 121*n.* ; and *Loring* v. *Thomas* (1861) 1 Dr. & Sm. 497 followed.

APPEAL from an order of Sir John Bennett, Vice-Chancellor of the County Palatine Court of Lancaster.

John Allen Birchall died on May 20, 1908, leaving him surviving his widow Ellen, hereinafter called "the testatrix," and eight children of their marriage, including William Henry Birchall and Benjamin Birchall.

On May 11, 1914, the testatrix married Edward Valentine.

On September 20, 1917, William Henry Birchall died, leaving him surviving three children.

By her will dated June 3, 1937, the testatrix declared that her trustees should stand possessed of the property therein described as her trust estate in trust for all her children (other than her son Benjamin, to whom she had given an annuity) living at her death in equal shares: "Provided always that "if any child of mine (except the said Ben. Birchall) shall die "in my lifetime leaving a child or children living at my death "who being male attain the age of 21 years or being female "attain that age or marry then and in every such case such "last mentioned child or children shall take . . . . the share "which his, her or their parent would have taken in my trust "estate if such parent had survived me."

On March 11, 1938, the testatrix died and on June 7, 1938, her will was duly proved.

The said three children of William Henry Birchall were all living at the death of the testatrix and had all attained the age of twenty-one years.

In the administration of the estate of the testatrix the question arose whether the children of the testatrix's son, William Henry Birchall, who was dead at the date of her will, were entitled to a share of her trust estate.

On June 13, 1939, in the County Palatine Court of Lancaster, the trustees of the will presented an originating petition against the children and grandchildren of the testatrix praying that that question might be determined by the Court.

The Vice-Chancellor held that in the words of the will "if any child of mine . . . . shall die in my lifetime" the word "shall" must be construed literally as meaning a future event and applying only to children of the testatrix who died after the date of her will, and therefore that as the testatrix's son, William Henry Birchall, had died before the date of her will, his said three children were not entitled to a share of her trust estate.

The three children of William Henry Birchall appealed. The appeal was heard on February 14, 1940.

*George Maddocks* (for *Philip I. Bell* on war service), for the three children of W. H. Birchall, deceased, appellants.

The decision of the learned Vice-Chancellor was wrong and should be reversed.

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On the true construction of the words of the will "if any "child of mine . . . . shall die in my lifetime" the word "shall" must not be given only its dictionary meaning denoting the future tense and restricted to the case of a child of the testator dying after the date of her will, but must be given a conditional meaning equivalent to "should" so as to apply to the case of any child of hers dying in her lifetime whether before or after the date of her will: *Loring* v. *Thomas* (1); *In re Lambert. Corns* v. *Harrison* (2); *Barraclough* v. *Cooper* (3); *In re Metcalfe. Metcalfe* v. *Earle* (4); and *In re Williams. Metcalf* v. *Williams.* (5) The gift over to the children of a child who shall die imports a contingency. Notwithstanding that the testatrix's son W. H. Birchall died before the date of her will, his three children are, therefore, entitled to share in her trust estate.

*Edward Ackroyd,* for the other children and grandchildren of the testatrix interested in her trust estate, respondents.

The decision of the Vice-Chancellor was correct. In the words of the will "if any child of mine . . . . shall die in my "lifetime" the word "shall" must be understood in its literal sense as referring to the future and applying only to the case of a child of the testatrix dying after the date of her will: *In re Walker. Walker* v. *Walker* (6); *In re Cope. Cross* v. *Cross* (7); and *In re Brown. Leeds* v. *Spencer.* (8) The three children of the testator's son W. H. Birchall who was dead before she made her will are not, therefore, entitled to any share in her trust estate. The fact that in this will the word "shall" does not occur before the words "attain the age of 21" shows that when the testatrix does use the word "shall" she contemplates future events only, and this case is thus distinguishable from the cases cited on behalf of the appellants.

MacKinnon L.J. I think that this appeal succeeds. For my part I propose to deal with the matter very shortly. In the case of *In re Lambert* (1) decided over thirty years ago, which followed upon *Loring* v. *Thomas* (2) and *Barraclough* v. *Cooper* (3), the words in question were these: "Provided always "that if any nephew or niece of mine shall die in my lifetime, "leaving a child or children who shall survive me and being a "son or sons shall attain the age of 21 years, or being a daughter "or daughters shall attain that age or marry," "then and in "every such case the last-mentioned child or children shall "take the share which his her or their parent would have taken "of and in the residuary trust funds if such persons had "survived me." If for the words in that case "nephew or "niece of mine" the words "any child of mine" be substituted, then the words here are precisely and identically the same as the words there, with the one difference that in *In re Lambert* (1) the phrase was "who shall survive me and being "a son or sons shall attain the age of 21 years," whereas in this case it is "who being male attain the age of 21 years." The decision in the case of *In re Lambert* (1) was "that the child, "who attained 21 and survived the testatrix, of a nephew "already dead at the date of the will was entitled to share in "the residue." In the present case the claim is made by the child of a child already dead at the date of the will. It is said that the decision in this case ought to be to the contrary of that in the case of *In re Lambert* (1), because the word "shall" is omitted before the verb "attain." That is a subtlety which I am quite unable to appreciate. If these cases were to be decided upon minute differences of that sort, it seems to me that the art of will construction would get into a highly discreditable condition. The truth is that the phrase "who "being male attain the age of 21 years" is exactly equivalent to the words "who being a male shall attain the age of 21 "years." As I suggested during the argument, if you attempted to translate one or other of those two phrases into Latin, I believe that in either case it would be necessary to use in Latin exactly the same verb.

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(1) (1861) 1 Dr. & Sm. 497.
(2) [1908] 2 Ch. 117.
(3) [1908] 2 Ch. 121*n*.
(4) [1909] 1 Ch. 424.
(5) [1914] 2 Ch 61.
(6) [1930] 1 Ch. 469.
(7) [1908] 2 Ch. 1.
(8) [1917] 2 Ch. 232.

In those circumstances, this case appears to me to be

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(1) [1908] 2 Ch. 117.
(2) 1 Dr. & Sm. 497.
(3) [1908] 2 Ch. 121*n.*

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completely indistinguishable from the decision in *In re Lambert* (1), which only followed the decisions in *Loring* v. *Thomas* (2) and *Barraclough* v. *Cooper* (3), and various other cases; and therefore the same result ought to follow in this case as in those cases.

For these reasons I think that this appeal should succeed.

CLAUSON L.J. I agree, for the reasons which have been expressed by MacKinnon L.J.

FARWELL J. I also agree.

*Appeal allowed.*

Solicitors for appellants: *Percy Haseldine & Co., for Wilfrid Taylor & Hindle, Manchester.*

Solicitors for respondents: *Alfred McMaster, Liverpool, for Leo Kennedy & Glover, Ormskirk.*

(1) [1908] 2 Ch. 117.
(2) 1 Dr. & Sm. 497.
(3) [1908] 2 Ch. 121*n.*

J. R.

## BOND *v.* NOTTINGHAM CORPORATION.

C. A.
1940
Mar. 5, 6.

*Easement—Right of support—Housing—Clearance order—Demolition notice—Failure to comply with notice—Work to be carried out by local authority—Equivalent support for dominant tenement—Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 26.

Where a building has a right of support by another building which abuts on it, the supporting building may not be demolished by the local authority under a clearance order made under the Housing Acts, 1930 to 1936, and confirmed by the Minister of Health, without providing an equivalent support for the dominant tenement outside the clearance area.

Decision of Simonds J. reported under the names *Bond* v. *Norman. Same* v. *Nottingham Corporation* [1939] Ch. 847 affirmed.

APPEAL from a decision of Simonds J. (1)

In January, 1935, a demolition notice under the Housing Act, 1930, was served on one Norman in respect of certain premises owned by him and known as Apsley Place, Nottingham. These premises were comprised in the Nottingham (Apsley Place) Clearance Order, 1934, confirmed by the Minister of Health in January, 1935. The notice became operative in March, 1935, and the period allowed for vacation of the premises expired in October, 1938.

The plaintiff George Cresswell Bond was the owner of premises known as Apsley House, Alfreton Road, Nottingham, and 15, Peveril Street, Nottingham, immediately outside the area subject to the clearance order. These premises abutted on an adjacent building belonging to Norman, which he had been ordered to demolish, and had a right of support from that adjacent building.

The plaintiff requested Norman to give him a written undertaking that upon the demolition of the adjacent building he (Norman) would provide equivalent support for the plaintiff's building. This Norman refused to do on the ground that he was only preparing to carry out a statutory order.

(1) *Bond* v. *Norman. Same* v. *Nottingham Corporation* [1939] Ch. 847.

The plaintiff thereupon brought this action against Norman and the Nottingham Corporation, claiming a declaration that he was entitled to equivalent support for his building on the demolition of Apsley Place, and he moved the Court for an interim injunction to restrain the defendants from demolishing Apsley Place or removing any support given to his house without first providing equivalent support. The motion was by consent treated as the trial of the action.

The Town Clerk of Nottingham stated in an affidavit that Norman having failed to demolish his premises within six weeks of February 6, 1939, the Nottingham Corporation were entitled and obliged by s. 26 of the Housing Act, 1936 (1), to enter and demolish them after March 21. The corporation declined to give any undertaking to supply equivalent support on the ground that any such undertaking would derogate from the statutory duty of the corporation.

The case was first dealt with as against Norman, and Simonds J. held that he was bound to provide equivalent support to the plaintiff's house on demolishing the building adjoining it.

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(1) The Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 26: "(1.) Where as respects any area "declared by them to be a clear-"ance area a local authority deter-"mine to order any buildings in "the area to be demolished, they "shall make and submit to the "Minister, for confirmation by "him, an order (in this Act referred "to as a 'clearance order') order-"ing the demolition of each of "those buildings.

"(2.) The provisions of the "Third Schedule to this Act shall "have effect with respect to the "making, submission and con-"firmation of a clearance order, "and the provisions of the Second "Schedule to this Act shall have "effect with respect to the vali-"dity and date of operation of "such an order.

"(3.) Where a clearance order "has become operative, the owner "or owners of any building to "which the order applies shall "demolish that building before the "expiration of six weeks from the "date on which the building is "required by the order to be "vacated or, if it is not vacated "until after that date, before the "expiration of six weeks from the "date on which it is vacated or, "in either case, before the expira-"tion of such longer perod as in "the circumstances the local "authority may deem reasonable; "and, if the building is not "demolished before the expiration "of that period, the local author-"ity shall enter and demolish the "building and sell the materials "thereof."

Later the corporation gave notice to the plaintiff that, Norman having failed to demolish the premises, they proposed to do so, and without equivalent support, and thereupon the motion was restored as against the corporation.

Simonds J. said that the defendant corporation claimed that they had an absolute and unqualified duty to perform and that it was no affair of theirs if in performing it they let down a neighbouring house. The plaintiff contended that apart from the easement of support the defendant corporation had no right so to perform their statutory duty of demolition as to let down his house outside the clearance area. Secondly, it was urged that whatever might be the position when there was no easement of suppport the Act could not be interpreted as authorizing the defendant corporation to deprive the plaintiff of his easement without compensation. It was unnecessary to decide the wider proposition, but he was clearly right in his narrower proposition. He could find nothing in the Housing Act, 1936, which justified the defendants in depriving the plaintiff of his right of property.

The corporation appealed. The appeal was heard on March 5 and 6, 1940. There was no appeal by Norman in the action brought against him.

*Charles Harman K.C.* and *Wilfrid Hunt* for the appellants. There is no reason for regarding the easement of the adjoining owner as one that must be preserved. When the Legislature orders that a certain thing shall be done and does not provide for compensation, no compensation is payable. There is no such thing as a perpetual easement. If the servient owner lets his house fall down, the easement of support comes to an end: *Colebeck* v. *Girdlers Co.* (1); *Jones* v. *Pritchard.* (2) Similarly here the demolition order when performed destroys the easement: Local authorities that have to carry out demolition orders do so as the agents of the law and have no right to inquire as to titles, so that normally they will do the work without knowing whether the property to be demolished is subject to any easement or not. The position where there is no easement of support is considered in *Peyton* v. *Mayor, etc. of London* (1) and *Dodd* v. *Holmes* (2), and these cases show the difficult position of local authorities by reason of their ignorance of whether there is an easement to which any property to be demolished is subject.

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(1) (1876) 1 Q. B. D. 234, 243.

(2) [1908] 1 Ch. 630.

The appellants' duty under the Housing Act, 1936, s. 26, is to demolish the house included in the clearance order and to sell the materials. They have to sell all the materials and cannot leave any for support; it is only the balance of the expenses of the demolition that they can recover from the owner. Therefore no obligation can be found in the Act for the local authority to render support and when a statutory duty is imposed on a public body to do the very thing they have done, no action will lie in respect of the doing of it. All the statute here says is "shall demolish."

[Sir Wilfrid Greene M.R. That argument assumes in the appellants' favour the construction of the language of the statute for which they are contending.]

All the statute says is that they are to "demolish" the premises. It is admitted that Norman might well have been liable under the easement to provide support, but as against the appellants there is no right of support.

[Sir Wilfrid Greene M.R. If the corporation had bought Norman's property, the easement of support would be gone but the adjoining owner would receive compensation.]

Yes, that is under s. 46, sub-s. 3, of the Act. But in the present case the land on which Norman's property stands does not belong to the appellants and they are therefore not affected by the easement in doing their statutory duty. Is it to be supposed that the ratepayers' money must be used in providing support to the adjoining house?

[Clauson L.J. It all comes back to the original question of what the appellants are obliged to do under the Act.]

Yes, and the only obligation under the Act was to "demolish." The language of the Act is too strong not to relieve the appellants of any obligation to provide support. It is always

(1) (1829) 9 B. & C. 725.

(2) (1834) 1 Ad. & E. 493.

a question of construction of the Act: see *Metropolitan Asylum District* v. *Hill.* (1)

To sum up, if a building subject to an easement of support falls down as the result of natural decay the easement goes with it. Here Parliament has said that Norman's house ought not to continue and appoints the appellants to pull it down. The statutory duty is to demolish, and the Act says nothing about giving support to an adjoining house, while the only expenses the appellants can recover are the expenses of demolition. The appellants as the local authority have to act quickly on the owner of the house making default in demolishing it. The wording of the Act is clear and does interfere with property without compensation. The house is taken away without compensation and the adjoining owner loses his easement.

[They also referred to the Housing Act, 1930, ss. 1, 6, 11 and 13.]

*J. Neville Gray K.C.* and *E. J. Rimmer* for the respondent. The usual course is that where a statute takes away a private right compensation is provided. Sect. 46, sub-s. 3, of the Housing Act, 1936, provides that when the local authority take the course of purchasing land under this Part of the Act all private easements to which the land is subject are extinguished and the person who suffers thereby receives compensation. The reasonable assumption is that when no provision for compensation is made the easement is not taken away: see in regard to the object of passing these Housing Acts the preamble to the Housing Act, 1930. The Act of 1936, being a consolidating Act, must have the same object. No doubt the Act contemplates that where provision is made for clearance the rights of any owner of the land directed to be cleared are disregarded, but he is getting the cleared site, and hardship might well be imposed on the owner of property which in the public interest should be removed. But he alone suffers loss and there is no ground for depriving the owner of property outside the clearance area of any right without compensation.

(1) (1881) 6 App. Cas. 193, 203.

It is reasonably plain that in a case where no compensation is provided for the right is preserved. This fits in with the scheme of the Act: see ss. 25 and 26. Under s. 26, sub-s. 3, it is clear that the duty of demolishing is cast on the owner and that if he fails to perform it the local authority does so as his agent.

[CLAUSON L.J. referred to s. 32 of the Act.]

Any expert called upon to demolish a house would inquire whether any adjoining house had a right of support and would demolish in a manner proper to use having regard to the rights of others. A right should not be treated as taken away unless the language of this Act is strong enough to compel it: *Geddis* v. *Bann Reservoir Proprietors* (1); see also the dictum of Lord Esher in *Attorney-General* v. *Horner* (2), and *Commissioner of Public Works* v. *Logan* (3), where that dictum was repeated and emphasized.

[SIR WILFRID GREENE M.R. The fact that the owner of an easement is not one of the persons who may be heard at the inquiry emphasizes the position here.]

Yes, and when there is also taken into account that in a case like the present there is no provision for compensation as in s. 46, sub-s. 3, it is clear that the whole scheme of the Act that when a clearance order is made and premises within the area demolished by their owner or the local authority any easement to which the premises are subject for the benefit of property outside the clearance area is preserved.

*Charles Harman K.C.* replied and referred to *East Fremantle Corporation* v. *Annois.* (4)

SIR WILFRID GREENE M.R. I find myself in agreement with the conclusion of Simonds J. and with the reasons on which it was based. I shall, accordingly, confine myself to making a few observations which are suggested by the arguments which we have heard.

In dealing with a matter of this kind, it is legitimate, and in fact necessary, to consider the consequences of the one construction of the Act of Parliament and of the other construction, for the purpose of seeing whether or not one of those constructions runs counter to certain principles which the Legislature prima facie is supposed to follow. The most relevant consideration in this particular case is that which was stated in a well known passage by Lord Esher in the Court of Appeal in *Attorney-General* v. *Horner* (1), which is quoted by the learned judge in his judgment: "It is a proper rule of "construction not to construe an Act of Parliament as interfering "with or injuring persons' rights without compensation, "unless one is obliged so to construe it."

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(1) (1878) 3 App. Cas. 430.

(2) (1884) 14 Q. B. D. 245, 256, 257.

(3) [1903] A. C. 355, 363.

(4) [1902] A. C. 213, 217.

It is not disputed in the present case that the construction contended for by the appellants would result in interfering with the plaintiff's rights without compensation. But it is said that the language of Parliament is so clear that we are obliged to construe it as having that result.

I think the admitted fact that the appellants' construction will produce that consequence will bear a little addition. The legislation is complicated: but it is not merely that on that construction the plaintiff will be deprived of his rights without compensation; but that deprivation, according to that construction, will be of a peculiarly capricious character.

I say that for this reason. There are in the Housing Acts concerned—the Act of 1936 is the one to which it is convenient to refer—alternative methods by which a local authority can secure the elimination of buildings which, for the reasons stated in the Act, it is considered desirable to eliminate. One is by ordering the demolition of the buildings in the area; the other is by purchase by the local authority itself. That purchase may be either by agreement or it may be compulsory. I need not concern myself with the purchase by agreement; but where the particular choice of the local authority falls upon purchase, the Act provides for the extinction of easements affecting land purchased, and also for the giving of compensation to the persons entitled to the easement. It is a perfectly intelligible scheme, under which

(1) 14 Q. B. D. 245, 256.

Parliament, for good reasons, takes away a man's rights, but provides for compensation.

Note, however, how different are the consequences if the local authority makes the other choice and determine to proceed by a clearance order. It is contended that, whether it is the owner or the local authority who does the work consequent upon the making of the clearance order, they are both entitled, in effecting the necessary demolition, to disregard entirely the right of the owner of the easement, which in this case is an easement of support. If the proceeding is by means of a clearance order, the owner of the building, if he demolishes, or the local authority, if it demolishes, can get rid of that easement; or, at the least, according to Mr. Harman's argument, can so seriously affect the position of the proprietor of the easement that he has either to allow his house to collapse, or himself at his own expense to set up the necessary support. For the purposes of the consideration to which I am directing my remarks, it matters not which of these two things be right; because in each case the right of the owner of the easement is seriously affected. Accordingly, it would appear that Parliament has produced the result (which I cannot characterize as other than capricious) of giving to the owner of the easement compensation, if the local authority chooses to take one course, and depriving him of compensation if it chooses to take the other. If Parliament has so decreed, well and good; but no intelligible reason has been suggested to us why Parliament should have drawn a distinction of that character between the two cases, thus leaving it to the decision of the local authority to take a course which may or may not affect the rights of the owner of the easement without consulting him. That is a consideration which I think it is legitimate to take into account.

But there is a further matter which bears upon the same argument, and it is this. Whichever of the two courses the local authority is minded to adopt, namely, clearance order or purchase, the Act provides for a hearing for certain classes of persons, at which they can urge their objections to the taking of whichever course is decided upon. The classes of persons entitled to take objections are the owner, who in the Act is defined as the owner in fee, lessees, occupiers, and if possible mortgagees; but excluding tenants for a month or less. Those provisions will be found in the First and Third Schedules to the Act. If the inquiry is one relating to a proposal for compulsory purchase, those persons are entitled to appear and be heard. On the other hand, the owner of the easement is not entitled to be heard. He does not belong to any of the classes who are regarded by the Legislature as proper persons to be heard in opposition. The fact that he is excluded from taking part in such an inquiry may be galling to him, but he has the consolation at any rate of knowing that, although the effect of the order will be to extinguish his easement, he will get compensation for the loss so suffered. Very different is the position where the inquiry is one which relates to a clearance order. In that case, as in the other case, the owner of the easement is excluded from being heard. But, in that case, his position is doubly galling; because he knows that not only is he given no opportunity to state his objections, which may be very serious, but he is faced with the situation that, without his having been heard at all, his right of easement, or whatever it may be, is going to be taken away from him, or at the lowest, he is going to be subjected to expense in making it effective, without one penny of compensation being given to him. There, again, I cannot help thinking that there would be some capriciousness in the Act of Parliament if that were the consequence.

I mention these matters because it seems to me that, if the appellants' construction is right, they do form an aggravation of the simple case of taking away property without compensation; because they mean that the process of taking away that property (or compelling the owner at his own expense to preserve it) without compensation shows, when compared with the other provisions of the Act, a complete inconsistency for which no reasons can be suggested.

Armed with those considerations, it becomes necessary to approach the construction of the Act itself. The question lies in the smallest possible compass; and turns ultimately upon the meaning of one word, read, of course, in the context in which it is found, and in the light of the Act of Parliament as a whole. Mr. Harman, on behalf of the appellants, did not accept the view that the owner of this building, Mr. Norman, was under any obligation, if he had carried out the demolition, to provide alternative support for the plaintiff's house. But he said, and very fairly said, that even if Mr. Norman was under an obligation of that character, such obligation does not extend to the local authority, because, in construing the language used in reference to the duties imposed on the local authority, it is unnecessary to consider what is the nature of the duties and powers in the case of Mr. Norman.

I think the proper way of construing the more immediately relevant section, s. 26, is to consider in the first place what are the powers and duties of the owner. It is to be noticed that the obligation imposed on the owner is in terms the same as that imposed upon the corporation. The words are "shall "demolish." When I consider the position of Mr. Norman, confronted on the one hand with the existence of the right of support vested in his neighbour, and on the other hand by the direction of an Act of Parliament which tells him that he shall demolish the building which provides the support, it seems to me that Mr. Norman, in construing the language of the Act of Parliament, is bound to construe it in relation to the existing state of affairs as between himself and his neighbour. In that relationship, Mr. Norman is not the owner of a building free from any rights in other persons. He is the owner of a building which is the subject of a real right in a neighbour which qualifies and cuts down the plenitude of his ownership.

The nature of the right of support is not open to dispute. The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If it does so, and support is removed, the owner of the dominant tenement has no cause for complaint. On the other hand, the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his

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neighbour's building. He is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs, and so forth, to the part of the building which gives the support. But what the owner of the servient tenement is not entitled to do is, by an act of his own, to remove the support without providing an equivalent. There is the qualification upon his ownership of his own building that he is bound to deal with it, and can only deal with it, subject to the rights in it which are vested in his neighbour.

Taking the case of a person in that situation, what is the proper construction of an Act of Parliament which directs him to demolish his building ? It seems to me that, when it is borne in mind that one construction will result in doing the thing which must not be done, according to what Lord Esher said in *Attorney-General* v. *Horner* (1), and the other construction will not, the only construction we ought to put upon the words is one which, without, in my view at any rate, doing any violence to the language, will avoid the consequence referred to by Lord Esher, and will resolve the difficulty. It seems to me that, when the owner of the servient tenement demolishes his building in such a way as to affect his neighbour's right and let his neighbour's house down, he may properly be said to be doing something more than merely demolishing his building. He is not merely dealing with what is his ; he is dealing with what is not his. He is demolishing his building, and, at the same time, affecting what the law recognizes as a right of his neighbour in that building.

In those circumstances, it appears to me that the proper construction to put upon the word " demolish " involves this : that the manner of demolition must be such as not to interfere with the neighbour's rights. That does not mean that the demolition is necessarily to stop short at the point where the existing building begins to provide support, for the reason that it is not the right of the owner of the dominant tenement to insist upon the maintenance of that individual and particular building. His right is given effect to, if that building is taken away, by providing that some substitute is put there for it. He is entitled to say to his neighbour: "Either you leave your building, or the necessary part of it "as it is, or if you choose to pull it down, you must provide a "substitute."

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(1) 14 Q. B. D. 245, 256.

Mr. Norman, in this case, being confronted with that alternative, it seems to me that the method of demolition which he is ordered to carry out must be one which gives effect to the rights of his neighbour, and that he can do, and consistently with the direction of the Act of Parliament may very well be bound to do, by taking down the whole of his building and providing the necessary support, I see no difficulty myself in regarding the totality of these operations as falling within the general process of demolition.

If that view as to Mr. Norman's position be right, I am quite unable to discover any reason why demolition by the local authority should be affected by any different rule. The local authority is put there to perform a duty primarily imposed upon the owner, but not carried out by him. It is when he makes default in the duty of demolition that the local authority has imposed upon it the same duty of demolition, no more and no less. It seems to me that to construe this Act of Parliament as giving a different quality to the duty of the local authority in demolishing to that which is found in the case of the owner would be quite unjustifiable. Accordingly, in my opinion, both the owner and the local authority (whose position I, without attempting any particular accuracy, for convenience venture to describe as that of a statutory contractor) are under an obligation to adopt that method of demolition which will not interfere with the right of the plaintiff in respect of the building to be demolished and the support to be derived from it.

It was suggested in the argument that the true effect of the Act of Parliament is, so to speak, to substitute a statutory destruction of the building for a destruction which might take place by the processes of time. The local authority was likened to a statutory executioner, to whom was committed the duty of bringing that process about. That imagery is picturesque; but, in my opinion, misleading. I see no reason at all for importing into the construction of this Act of Parliament any such idea as that of a sort of statutory decay or statutory execution. It seems to me that the language of the Act of Parliament can be interpreted without indulging in such fancies.

Other matters referred to were the difficulties in which the local authority, not being the owner of the land, would find itself, in ascertaining whether or not an easement existed. It is very unfortunate, no doubt, but such risks and difficulties have to be faced every day, not merely by local authorities, but by any other owner of property. I can see no reason for giving to this Act of Parliament an interpretation, which would relieve them of what may be a troublesome and difficult investigation, at the expense of the unfortunate neighbouring owner, whose rights on that view would be affected.

For these reasons, as well as for those given in the judgment of the learned judge (which in my view is sufficient in itself to dispose of this case) the appeal, in my opinion, fails, and must be dismissed with costs.

MACKINNON L.J. I agree. After the careful judgment of the learned judge in both parts of the case, in the Norman case and in the case of the Mayor and Corporation of Nottingham, now amplified by the judgment of the Master of the Rolls, I do not think I should serve any useful purpose by adding anything.

CLAUSON L.J. I agree.

*Appeal dismissed.*
*Leave to appeal to House of Lords on terms.*

Solicitors: *Sharpe, Pritchard & Co., for J. E. Richards, Town Clerk, Nottingham; Peacock & Goddard, for Hunt, Dickins & Willatt, Nottingham.*

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## *In re* CAPON.

## *Ex parte* THE TRUSTEE IN BANKRUPTCY *v.* R. C. KNIGHT AND SONS.

## *Ex parte* THE SAME *v.* WOODWARD AND WOODWARD.

[No. 4 of 1938.]

*Bankruptcy—Pigs purchased at auction—Agreement between purchaser and auctioneers—Purchase price provided by auctioneers—Note signed by purchaser—Statement that pigs were property of auctioneers —Bankruptcy of purchaser—Property in pigs—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 17, *sub-s.* 1.

In bankruptcy proceedings, the findings of fact of a county court judge are open to review in the Divisional Court and the Court of Appeal, for in all bankruptcy proceedings an appeal is by way of rehearing.

A farmer having from time to time bid at auction sales for pigs which were knocked down to him, but for which he was not in a position to pay, received a bought note in the ordinary form, but also signed a note addressed to the auctioneers, who provided the purchase-money, stating therein that he agreed "to feed and see "after" the pigs for them and acknowledged that they were the property of the auctioneers who might remove them at any time. On any resales of the pigs he repaid the auctioneers their purchase price out of the proceeds of sale and they credited themselves with the usual auctioneers' commission if the resales were made at their auctions, or received 5 per cent. per annum on the purchase price in lieu of commission if the sales were made elsewhere. The day before the farmer executed a deed of assignment for the benefit of his creditors the auctioneers forcibly and without his consent removed the pigs at his farm. He was subsequently adjudicated bankrupt:—

*Held*, (1.) that the bankrupt when bidding for pigs at the auctioneers' auction sales was not doing so as the agent of the auctioneers and that the property in the pigs so purchased passed to him under s. 17 of the Sale of Goods Act, 1893;

(2.) that the note signed by the bankrupt before taking the pigs away did not operate to pass the property in the pigs to the auctioneers;

(3.) that in so far as the note purported to confer on the auctioneers a right to seize the pigs, it was void for want of registration as a bill of sale;

(4.) that, accordingly, the property in the pigs remained in the farmer and they were part of his assets in his bankruptcy.

Decision of Farwell and Morton JJ. (ante, p. 151) affirmed.

APPEAL from the Divisional Court. (1)

The facts, which are fully stated in the judgments together with the material evidence, were briefly as follow: Harry Urban Capon (hereinafter called "the bankrupt") was a farmer in Suffolk. Between 1934 and 1938 he acquired from time to time various lots of pigs at auction sales held regularly by R. C. Knight & Sons and Woodward and Woodward (hereinafter called "the appellants"), two firms of auctioneers. The bankrupt was not in a position to pay for pigs which he bought. The transactions were carried out under arrangements made between himself and the appellants whereby if the pigs were knocked down to him he received a bought note in the usual form. The appellants themselves provided the purchase-money. Before the bankrupt removed the pigs he signed a note addressed to that one of the appellants that had conducted the auction. The following was typical of the notes so signed: "Received of Messrs. Woodward & Woodward, auctioneers, ". . . . 36 feeding pigs costing £134 4*s*., which I agree to "feed and see after for the said Woodward & Woodward. I "acknowledge that these pigs are their property and may be "removed by them at any time." The pigs were taken by the bankrupt to his farm and were fattened and then resold, and the appellants were repaid out of the proceeds of sale the moneys which they had paid. The resales were for the most part at auctions held by the appellants at whose auctions the pigs had originally been purchased. In that case the appellants credited themselves with the usual auctioneers' commission. If the pigs were sold elsewhere the bankrupt paid the one of the appellants at whose auction the particular pigs had been bought 5 per cent. on the purchase price in lieu of commission.

On February 24, 1938, the bankrupt executed a deed of assignment for the benefit of his creditors. On March 14, 1938, a receiving order was made against him. On March 18, 1938, he was adjudicated bankrupt, and James Benjamin Sanderson (hereinafter called "the trustee") was appointed trustee in bankruptcy.

(1) Ante, p. 151.

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Immediately before the execution of the deed of assignment the bankrupt had about 679 pigs on his farm. On February 23 and 24, 1938, the appellants, without the bankrupt's consent, forcibly entered the farm and removed the pigs, which they subsequently sold.

By two motions consolidated on April 5, 1939, the trustee sought a declaration that at the commencement of the bankruptcy the pigs were the property of the bankrupt and that their seizure was wrongful. He also sought an order that the appellants should pay him 4408*l.* 2*s.* 3*d.*, the proceeds of sale. His Honour Judge Hildesley K.C. dismissed the motions but on appeal the Divisional Court (Farwell and Morton JJ.) reversed this decision.

Farwell J. (who delivered the judgment of the Court) said it was not open to the Court to review the facts as found by the county court judge, but that different inferences might be drawn from the facts. The county court judge had taken an erroneous view in deciding that when the bankrupt bid for pigs he did so as the agent of the auctioneers and that when the pigs were knocked down to him the property in them passed to the auctioneers and not the bankrupt. In doing so, he had formed a misconception of the meaning of s. 17, sub-s. 1, of the Sale of Goods Act, 1893. (1) In the present case it had never been suggested by any one that the original vendors knew anything of the arrangement between the bankrupt and the auctioneers, and they clearly intended that the property in the goods when sold should pass to the bankrupt. If he was in fact the agent of the auctioneers he might have acquired the pigs as trustee for them, but as between himself and the vendors the property in them passed to him. Further, whatever might have been the result of the arrangements between the bankrupt and the auctioneers, they never operated to pass the property in the pigs to the auctioneers. The arrangements were extremely equivocal, but in the judgment of the Court the arrangements were intended to give the auctioneers some charge on the pigs to secure the moneys advanced; and as any such charge was not registered as a bill of sale it was admittedly invalid as against the trustee in bankruptcy. Consequently the pigs on the farm on February 23 and 24, 1938, were the property of the bankrupt and became part of his assets in the bankruptcy. The auctioneers must therefore account to the trustee in Bankruptcy for the proceeds of sale.

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(1) By the Sale of Goods Act, 1893, s. 17, sub-s. 1: "Where "there is a contract for the sale "of specific or ascertained goods "the property in them is trans-"ferred to the buyer at such time "as the parties to the contract "intend it to be transferred."

The two firms of auctioneers appealed. The appeal was heard on January 25, 26, 29, 30, 31.

*D. N. Pritt K.C.* and *A. S. Orr* for the appellants.

*Charles Harman K.C.* and *C. L. Henderson* for the respondent.

1940. Mar. 19. SCOTT L.J. This is an appeal from an order of a Divisional Court consisting of Farwell and Morton JJ., whereby they allowed the appeal of the trustee in bankruptcy of one Harry Urban Capon from an order of His Honour Judge Hildesley sitting in bankruptcy in the Ipswich County Court. The appellants before us are two firms of agricultural auctioneers, R. C. Knight & Sons and Woodward and Woodward, who held regular weekly or fortnightly auctions of stock at Stowmarket in Suffolk. I will refer to the firms as "Knights" and "Woodwards," and to the respective senior partners who gave evidence in the county court as "Knight" and "Woodward." The bankrupt—to whom I will refer as "Capon"—was a farmer, and on the morning of February 23, 1938, the day before the commencement of the bankruptcy, there were in his possession 679 pigs, in course of fattening, mostly on a farm called Kenton Hall, but some on an adjoining farm, both of which he owned and occupied. I shall refer to Kenton Hall as including both. The pigs had all been knocked down to him as bidder by one or other of the appellants at their auctions. At 10.30 A.M. on February 24, Capon executed a deed of arrangement. That was the act of bankruptcy to which the trustee's title related back. Partly on the 23rd, but mostly on the 24th, after 10.30 A.M., the appellants forcibly and against the will of Capon, removed the whole of the pigs and subsequently sold them by auction. This they did on a claim that the pigs belonged to one or other of them without distinguishing between the two firms: for they made no attempt to allocate the pigs according to their alleged ownership, doubtless because they had no means of identification. The proceeds of sale were 4408*l.* 2*s.* 3*d.*; but they claimed to deduct insurance, carriage and other expenses and commission, amounting to 27*l.* 19*s.*, leaving 4380*l.* 3*s.* 3*d.* From this sum they deducted 4151*l.* 4*s.*, as owing by Capon to them, for advances made by them in respect of the original auction—prices fetched not by the 679 pigs but 999 pigs—i.e., 320 more than the number still on the farm when they seized. The surplus of 228*l.* 19*s.* 3*d.* they admitted was the property of the trustee. Their realization account is a most instructive document, if considered in the light of the true facts, and of the affidavits which I analyse later. I regard the case as important and its facts as illuminating in connection with the public problem of short-term agricultural credit, although the question for our decision is in the final analysis quite simple.

The trustee took proceedings in the bankruptcy in Ipswich County Court, by two motions, subsequently consolidated, challenging the right of the auctioneers to remove the pigs, primarily on the ground that till the moment of the act of bankruptcy the pigs were the property of the bankrupt, and in effect that the auctioneers had wrongfully converted them. The learned county court judge decided against the trustee, holding that the property was not in Capon, but in the auctioneers. The trustee appealed to the Divisional Court. That Court seems to have assumed that s. 105 of the County Courts Act, 1934, applies even to an appeal from a county court sitting in bankruptcy, so as to bar any appeal except on law; but none the less they held that the learned judge's inferences from the facts were erroneous in law and reversed him. The assumption was mistaken. A county court sitting in bankruptcy exercises the same jurisdiction as the High Court (s. 103 of the Bankruptcy Acts, 1914–26); and under s. 108 of the same Act an appeal from either is a rehearing, the

Divisional Court being at liberty to review the county court judge's findings of fact. This position is preserved by s. 192, sub-s. 5, of the County Courts Act, 1934. The appeal to the Court of Appeal in bankruptcy is also a rehearing, but the judgment there is final, there being no appeal to the House of Lords.

From the decision of the Divisional Court the auctioneers appeal to us.

What started the business was that Capon wanted to buy pigs for fattening, but could not buy unless he could get credit for the whole price till such time as he could re-sell the pigs as fattened pigs. Up to a point the auctioneers' version of the facts fits in with the evidence of Capon's need of credit. It discloses a system of dealing, by which, whatever the parties called it, Capon did in fact obtain delivery without payment, on an indefinite credit, of all the pigs knocked down to him at each auction. Under it Woodwards or Knights, as auctioneers, paid to their principal, the undisclosed vendor, out of their own pocket, the whole purchase price of each lot sold, less commission, and agreed with Capon not to ask him to reimburse them till after the re-sale of the pigs by him two to four months later, when in the normal case the pigs, having been fattened, would fetch 50 per cent. to 100 per cent. more than they had cost at the original auction. But the way they sought to establish their property in the pigs was by alleging an oral agreement made by Woodwards with Capon before the first deal, by which Woodwards employed him to bid secretly on their behalf and as their agent, so that the property in the pigs would pass to them automatically at the auction on the fall of the hammer, and then remain in them, and never pass out of them to him until the moment when he finally re-sold the pigs, whether by auction through them, or by private sale without their knowledge. But as during the period that they were to have the property in the pigs it was equally necessary for him to have possession, a plausible pretext for separating their supposed ownership from his actual possession had to be invented. This they found in the well known agricultural custom of agistment, under which stock belonging to A is delivered to B to be agisted by him on his farm, i.e.,

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there to be fed and cared for by him. Very possibly they were aware of the legal point that agisted stock on a farm is safe from the reputed ownership doctrine of the Bankruptcy Act: see *In re James.* (1) If so, they may well have regarded the use of the word "agistment" as a happy thought. But whatever they had in their mind, the name "agistment" could not help them, unless they really were the owners of the pigs: and so their case at the trial wholly depended on their proving that an oral agreement had been made by Woodwards with Capon before the first transaction took place, that Capon should bid not for himself, but for them as their agent; and similarly by Knights before their first transaction. Mr. Pritt, for the auctioneers, did faintly argue an alternative contention that, even if Capon did not buy as agent for them, he must be considered to have re-sold to them after each auction; but there was not a shadow of evidence to support such a contention.

The substantial question in the case is thus whether this whole alleged system had any reality at all, or whether it was a sham; in other words, whether there was any truth in the auctioneers' story that Capon was buying not for himself, but as their agent in order to enable them as owners really to bail the pigs to him on agistment—or what they called agistment; for it was different from ordinary true agistment.

The general story of the case is told in considerable detail in the judgment of the county court judge, but I disagree with many of his findings and inferences, so it is necessary to re-state the facts as they appear to me. I have the less hesitation in differing from him, in that he discredited the evidence of Mr. Knight, the first witness called in support of the auctioneers' version of the story; and secondly, because the contemporaneous books of account support the trustee's case.

The bankrupt had earlier in his career been a farmer in a large way of business in different parts of Suffolk; but in 1927 his financial position forced him to execute a deed of assignment for the benefit of creditors with liabilities of

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(1) (1907) 24 Times L. R. 15.

67,000*l.* An arrangement was, however, then made and he escaped bankruptcy. In December, 1934, he occupied Kenton Hall, a fairly large farm, and certain other farms in Suffolk. In that month he started to obtain pigs at auction sales conducted by Woodwards as auctioneers. In January, 1935, he started similarly with Knights. In substance the course of business with each firm was the same: and there was not much difference in their oral evidence. It was common ground that Capon's commercial object was to fatten the pigs on his farm for a period of six weeks to two months, or, as he said, sometimes as long as four months, and then to sell them again at higher prices as fattened pigs. His profit was to come out of the differences between cost of acquisition and proceeds of final realization after allowing for all intermediate expenses, i.e., of feeding with purchased feeding stuffs (which are essential for fattening), tending, transporting to and from market, etc., including also all losses by sickness, accident, etc.; for it was also common ground that he took all risks, and the auctioneers none. Unfortunately he was financially weak, being short of both cash and credit. Indeed he could not buy at all unless he could get credit from the moment the hammer fell right up to the time when the pigs would finally be sold. He was able apparently to get ordinary unsecured credit from his sellers of feeding stuffs as long as his public credit remained unshaken; but no doubt he realized that the registration of an 1882 bill of sale would have been fatal to such credit, and probably that even a charge given by him to his bank on the pigs, with or without other farming stock, under the Agricultural Credits Act of 1928 and registered at the Land Registry, as required by that Act, would have been no less fatal.

He began by bidding at an auction held by Woodwards on December 14, 1934. Various pen-fuls of pigs were knocked down to him. He was not asked to make any payment, but was given a sold-note, and his name was thereupon entered in the firm's journal as purchaser in exactly the same way and on the same page of the book as others who were admittedly purchasers in their own right. His ledger account in their books was posted in just the same way as other purchasers' ledger accounts. On the day of the sale, Woodwards sent their own cheque for the price less their commission to their undisclosed principal, the vendor of the pigs he had bought. The pigs so sold remained in Woodwards' possession until removed, usually the next day, by Capon, who like other purchasers produced his sale-note to the man in charge as his delivery-order.

Woodwards' story in the county court was that, although they were employed as auctioneers by undisclosed principals to sell at auction, and although Capon bid in the ordinary way and got the lots knocked down to him, and although they knew he could not buy except on credit, and were content to pay their own principals forthwith the full selling price less commission, and so be out of their money and have to wait for payment of it until the time came when the pigs should be re-sold by Capon as fattened pigs, yet none the less that they did not give him credit at all; that before the first transaction he had already agreed with them to bid as their agent so as to pass the property in the pigs to them on the fall of the hammer; that they then bailed their own pigs to him on a contract of agistment for reward—his "reward" to be such profit (if any) as he could make on the ultimate re-sale after defraying all expenses, and taking all risks of death or accident or illness happening to the pigs. Woodwards called it agistment (and Knights followed suit), although at common law the agister takes none of those risks, but is only liable for negligence.

To establish this story Woodward relied almost entirely on three documents, a letter from himself to Capon dated December 18, 1934, i.e., four days after the auction where Capon first bid; a "receipt" for the pigs, which he enclosed for signature, calling it an "agistment note"; and Capon's reply of the 21st. The actual first "receipt" was not produced in Court; but one of August 27, 1937, prepared by Woodwards and signed by Capon—with a 6*d.* stamp imprinted—was produced, and it was said to be in identical form with that of December 21, 1934, except for figure and date. The one of 1934, therefore, no doubt ran as follows :— "Received of Messrs. Woodward & Woodward 45 pigs costing "164*l.* 19*s.* 0*d.* which I agree to feed and see after for Messrs. "Woodward & Woodward. I acknowledge that the pigs "are their property and may be removed and sold by them "at any time. (Signed) Harry Capon, Kenton Hall, December 21st, 1934." The two letters were as follows: "18th "December, 1934. Dear Harry, I now enclose you an Agist "Note in respect of the 43 pigs you purchased on Thursday "last for 160*l.* 7*s.* 0*d.* You will no doubt appreciate I "particularly want to keep this business on a business footing "and immediately these pigs are sold, you to pay us for them. "So far as I am concerned, I do not want to handicap you in "making the best price possible of the pigs when you re-sell "them. Of course naturally we should like to have them "come to our sale, but if you decide to sell them at home, you "to pay us 5 per cent. on the money and to remit the cash at "once. I think that for the pigs we sell in the Yard, we "should be allowed the usual commission of 6*d.* in the £. "I should also like to know if you propose to keep our pigs "separate and not to mix them with other pigs. I shall be "glad to hear from you that you agree to these terms and "that you think they are reasonable. Yours &c. (Signed) "H. Gordon Woodward." And the answer: "December 21st, "1934. Dear Gordon, Thank you for your letter. I quite "agree with your agist agreement and consider it quite reasonable. I have no doubt most of the pigs will come back to "your sale and doubtless you will sell more pigs for me than "come out of your sale: on the private bought pigs I shall "expect a slight reduction in the commission. Your pigs will "be kept separate almost invariably; when mixed I will let "you know. The present ones are in long yard at Blood "Hall. Any alteration in the number I will acquaint you. "Yours &c. (Signed) Harry Capon."

Before considering these three documents it is desirable to say a few words about the proceedings in the county court; the consolidated motions were heard together and the issues in each were the same; but the case against Knights was presented first in evidence. The material before the learned judge was an affidavit in each case by the bankrupt; an affidavit by each auctioneer; the transcript of a prior examination in bankruptcy of each auctioneer, and finally the oral evidence of Capon, Knight and Woodward. There is nothing in Capon's two affidavits to support the auctioneers' allegation of an antecedent agreement with him to act as their agent in bidding, on the contrary he contradicts it flatly; the nearest he gets to an admission that the pigs were not his property is the single sentence "Whilst they were in my "possession they were to be regarded as belonging to [the "auctioneer] and agisted by me." It was common ground that he was to be free to sell the pigs as and when he thought fit, and that he was not required to pay their purchase price until he did sell: and further that if he sold the pigs elsewhere than through the auctioneer through whom he had bought, he was to pay interest at 5 per cent. per annum for the period between his purchase at their auction and the re-sale elsewhere. If they were re-sold through the auctioneers they were to deduct their full commission. He admitted that he was to bear all risks. Finally he conceded that he was supposed to keep the pigs acquired through one auctioneer separated from those acquired through the other, and also from pigs acquired by himself elsewhere: but he said such separation was not practicable, and he did not think that "either "auctioneer could have picked out his own pigs." This last point has an important bearing on the main issue of fact. I can see no evidence that there was any effective segregation of any sort; much less any attempt to keep individual lots purchased permanently distinct, so as to enable him or the auctioneers to know the "provenance" of the pigs when re-sold by him either at their subsequent auctions or elsewhere. The fact is that he kept a current account of pigs as mere units of account like pounds sterling, treating pigs sold as being those represented by the oldest credit, and applying the criterion of maturity for sale as a modification of the rule in *Clayton's* case (1); I can see no possibility of any identification of pigs sold with pigs bought such as would enable either him or a fortiori the auctioneers to keep a record of what pigs in his possession were the property of which auctioneer, or of Capon in the case of pigs bought by him elsewhere: nor indeed was there any system or any attempt on the part of either party to preserve any continuing identity of pigs bought with pigs sold. It was no doubt contemplated at the outset of the course of business that the pigs would as a rule be sent back for re-sale to the auctioneer through whom Capon had bought them; but he was in fact left free to sell by private treaty if he chose, and there was no arrangement for the particular firm to be notified, or for their leave to be required, if he wanted to sell otherwise than through them. His unfettered freedom, and the absence of any method of identification, made the practical observance of any such system impossible; although quite probably the expectation of the auctioneers that they would as a rule get the auctioning of a number of pigs comparable to his purchases, operated in their minds as a commercial justification for granting him credit.

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(1) (1816) 1 Mer. 529, 572.

I now return to the only documentary evidence there was which gave the least support to the auctioneers' story, namely, the original three Woodward documents which I have already read out. The agistment note was primarily a bailee's receipt for the 43 pigs, costing 160*l.* 7*s.* 0*d.* The cost price was obviously irrelevant to an ordinary agistment contract; but if the reality of the transaction was a purchase by Capon and an advance by Woodward at his request of the purchase price to the vendor, the record of its amount would be natural enough. Otherwise the first three lines do contain the main terms of an ordinary contract of agistment except that the reward to the agister is omitted. The auctioneers swore that Capon's reward was to be his profit on the re-sale of the particular pigs bought after deducting all expenditure on those pigs up to re-sale; but in saying this they ignored altogether the business risks, very real on the average, of (1.) death, (2.) illness, (3.) accident, and (4.) interference with marketing caused by swine fever in the neighbourhood; yet all of these risks were on their story separated from ownership and put upon him, as the agister, with, as the event showed, disastrous consequences to his average profit on the totality of transactions. Nor did they have regard to those pigs, which in accordance with the alleged contract, he might sell elsewhere, with little or no profit, or even at a loss on the average, a very important factor, as in the absence of any system of identification he could not know when he sold what he had paid for any individual pig.

The last two lines of the " receipt "—" I agree the pigs are "their property and may be removed and sold by them at "any time "—would be mere surplusage in the common agistment contract, in which re-delivery on demand is the owner's right. But such right of removal and sale at any time and without notice is definitely inconsistent with even their own evidence of the terms of the contract, which was that Capon was to have an unqualified right to keep the pigs until he regarded them as ripe for re-sale—a right which was essential to his opportunity of earning the profit which they said was his agreed reward. On the other hand if he was, and the auctioneers were not, the owner of the pigs, and if the agistment note was meant to operate as a license to seize given to them by him as owner, conferring on them a right which would prevail against his unsecured creditors, they may well have thought it effective ; they were not lawyers, and apparently never took legal advice as to the validity of their plan as a whole. Capon also may have been willing, in his dire need of credit, to sign the receipt, without realizing that his " regarding the pigs as their property," as he said in his affidavit, was wholly ineffectual to give them any right to seize ; or he may not have cared, whether it was valid or not, as long as he got his pigs on credit. He was no doubt ready to do almost anything in order to avoid the fatal damage to his credit which would have resulted from the publicity of any registered document. It was stated in evidence in the county court that the " receipt " had been shown to counsel, and passed by him as an effective note of an agistment contract. If it was so shown, we may safely assume that counsel was simply asked the one question, and not told anything of the facts of the case. It is clear from the receipt, that whilst it assumes the property to be in the auctioneer, it contains no hint as to how it got there, such as might have put counsel on his guard. That and several other essential terms of the alleged bargain are absent from the receipt. Incomplete references to certain of them appear in the two letters between Woodward and Capon of December, 1934, but in the main the appellants were obliged to rely on their oral evidence about them; although Woodward seemed in his evidence really to regard the receipt almost as a document conferring title upon him, and to attach little importance to any oral bargain.

It is difficult to imagine, if such a course of dealing had been really agreed, that a written contract would not have been drawn up. The unreality of such agreement is further shown by Woodwards' letter of December 18, which is in certain respects quite inconsistent with it. It speaks of "the pigs "you purchased" and of the price of "the pigs when you "re-sell them." It assumes complete liberty in Capon to sell "at home," i.e., not to auction them publicly, through Woodwards, and calls for interest in that case on the money originally advanced. It also assumes a right in Capon not to keep Woodwards' pigs separate, for it asks what he "proposes." The reply of the 21st is entirely consistent with this criticism, for it puts pigs, which he calls "private bought," in the same category with those purchased by him at Woodwards' auction: it also assumes his right to "mix," but adds a voluntary promise to notify a change of number.

In Knights' case there was always a similar "receipt" or agistment note, but no letters were exchanged just after their first dealing. Otherwise their evidence was similar to Woodwards', though Knight was called before. The only real attempt to answer the trustee's case against them, was the auctioneers' evidence that it was a notorious custom for agricultural auctioneers to buy through dummy bidders for themselves, the dummies being farmers; and then to give possession to the farmer on so-called agistment terms. It was not necessary they said to inform their principals either beforehand or when sending the cheque for the price realized less commission, and they had not done so in the present case. Knight in evidence said that he did not tell the vendors because they knew it; but no vendor was called to say so in the witness box. Woodward also said he did not tell the vendor. On this point Mr. Pritt for the auctioneers conceded frankly that such a contract of sale by the vendor through the dummy bidder to themselves would have been voidable, but relied on the fact that it was not avoided, as sufficient for his appeal. Knight also asserted in the county court that the practice of his buying for himself and agisting the pigs to the farmer was well known to the feeding-stuff merchants who gave the farmer credit (unsecured) for the feeding stuffs required: but this evidence hardly harmonizes with para. 7 of his own affidavit, in which, narrating the interview he and Woodward had with Capon on February 22, 1938, the day before they began their removal of the 679 pigs, he swore that "Capon's "only allusion to his creditors, which I can recollect, was an "intimation that the removal of the pigs would cause his "creditors for feed supplied, to require immediate payment "and thereby put him in financial difficulties, but I am unable "to recollect the precise words he used." That remark of Capon's shows incidentally how his credit would have collapsed if the merchants had supposed for a moment that the ostensible ownership of the pigs on his farm was not real.

Woodward in the county court said that "the agistment "note was the bargain"; as in his examination in Capon's bankruptcy he had said that the agistment note and the two letters "set out the whole transaction": but he would not depart from the view stated in his affidavit that by arrangement with him the bankrupt had bid as his firm's agent. In my view, however, Capon's admitted freedom to do what he chose with his pigs, without any notice to the auctioneers, who professed to own them, is one of the fundamental inconsistencies in their story, and shows it to be false. For instance when swine fever was in the district towards the end of 1936 and early in 1937 Capon sold 400 pigs to his Co-operative Society, the Eastern Counties Farmers

Trading Society, for immediate slaughter at a low price: but Woodward in the witness box said he did "not know till "yesterday that a large number went to 'the Eastern "'Counties.'"

The auctioneers' books were in my opinion the most conclusive evidence against the alleged agreement. Woodwards' books of account treated Capon's purchases as being purchases for himself and there is no entry at variance with this vital feature. Indeed there is not a shred of evidence in those books to indicate anything but a normal purchase: and it was not disputed that all the sales by Capon whether by private treaty or by auction through either of the appellants, were sales by him; though how they imagined that the property got divested out of them and into Capon did not appear; and it is to be remembered that they did not even know of his private sales till after the event. Buying notes at the start and selling notes when he sold by auction were duly rendered to him as to every other buyer or seller. In Knights' case only is there any entry or method of book-keeping which even appears to throw doubt on Capon's ownership from start to finish. Towards the end of 1935 that firm thought fit to start a special book, subsequently labelled by their auditors the "agistment ledger," for so-called "agistment" transactions: the letters "A/L" being prefixed in the Journal to items to be posted from it to the Agistment Ledger.

The inference, however, which we were invited by the appellants to draw from Knights' change in their book-keeping, namely, that the ownership was really in them, did not appeal to us. In the first place, the fact that an "agistment note" was always signed by Capon, coupled with Knights' belief that it conferred some protection on them as creditors, sufficiently accounts for the late adoption of the "agistment" book-keeping practice. In the second place, from such material as we had it seemed to us that Woodwards' books, and also Knights' books, as a whole definitely controverted the inference, and pointed to a true purchase by Capon. We accordingly had the original books of both firms

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produced to us in Court, and Knights' books were very candidly explained to us by their book-keeper.

It was agreed by counsel for the respective parties that the following information appearing from the books produced and the explanations given to us by the book-keeper should be treated as being properly in evidence before this Court, namely: (1.) That interest was paid by the bankrupt on the original purchase price bid by him for pigs at auctions held by Messrs. Knight & Sons where such pigs were subsequently resold by the bankrupt elsewhere than at auctions held by Messrs. Knight & Sons and that such interest was calculated at the rate of 5 per cent. per annum for the period during which the original price was in fact outstanding. (2.) That Messrs. Knight & Sons kept a loose leaf ledger containing debtor and creditor accounts relating to purchases and sales at their auctions in the form appropriate to credit transactions between themselves and their customers and also a book called an agistment ledger which was kept on precisely the same lines as the loose leaf ledger except that the word "agist" is used in it to describe the transactions under which the bankrupt obtained pigs from Knight & Sons auction sales instead of the word "bought." There were other persons who bought at auctions held by Messrs. Knight & Sons under arrangements similar to those existing between the bankrupt and Messrs. Knight & Sons. (3.) That although the so-called agistment arrangement started in January, 1935, no account for the bankrupt was opened in the agistment ledger of Messrs. Knight & Sons until November 28, 1935.

The only possible conclusion on the evidence as a whole at which I can arrive is as follows: Capon wanted credit; indeed he could not carry on without it. Woodward knew his shaky position, but wanted his custom in order to augment the regular attendance of farmers at his auctions; for his firm lived out of commissions on sales. He was fearful of giving purely personal credit and wanted to get some kind of security if he could; but he realized that Capon's public credit would be badly weakened if it became known that his stock was not his own, and would certainly collapse if, in order to obtain credit, he gave any charge which had to be registered; and that this would be the end of Capon as a supporter of his market. The agistment device occurred to Woodward—or perhaps he had tried it before; for there was no evidence as to when he first used it. He drafted his "agistment note" in the form of a receipt, asked his question of some counsel, got an encouraging answer about the form; and guessed that Capon would sign it if asked. So he enclosed it in his letter of December 18, 1934, in which he discreetly referred to the pigs as "purchased" by Capon. He was an old friend, having helped Capon to escape bankruptcy in 1927, and it may well be that his friendship made him a little careless of the realities of what he was doing.

Knight came along a few weeks later: availed himself of the start made by Woodward, with whom he was evidently intimate, and copied him. It was only, as I have said, ten months later, that Knight thought of giving the system verisimilitude by opening a special ledger. It may be that both of them supposed that the property in the pigs had somehow passed to them; or it may be that one or both of them realized that the scheme was—what shall I call it—a try-on. Fortunately this Court need not decide which it was: but I cannot help regarding the whole system as an improper device to get the better of unsecured creditors whilst avoiding the publicity of registration; as would have resulted if Capon had given a documentary charge to the auctioneers under the Bills of Sale Act, 1882, or to his bank under the Agricultural Credits Act, 1928. That the two auctioneers should have made Capon sign a document, which was to remain secret until wanted, saying that the pigs belonged to them, shows how dangerous these irregular methods of credit may become. That live-stock assets of 4400*l.*, ostensibly belonging to a farmer who is receiving large supplies of feeding stuffs on his personal credit—a credit created by their very presence on the farm after being purchased by him at public auction—should in reality belong to the auctioneers, would be a monstrous injustice to the merchants and others who gave him credit: and yet that is the position which the appellants sought—albeit ineffectively—to bring about. It is of the very essence of any healthy system of agricultural credit that suppliers should know or be able to ascertain where they stand in regard to a farmer's ostensible assets: and that is the policy of the 1928 Act. Fortunately the evil attempt made in the present case has failed.

There is a further aspect of public importance. These two firms of auctioneers, if judged by what they attempted to prove, would seem to have been wholly oblivious of the duties of an agent in three respects. An agent employed to sell may not buy for himself; nor may he put himself in a position where his own interest even *may* conflict with his principal's interest—whether it in fact does so or not. Had these agents really intended to buy their principal's pigs they would have been acting in breach of both duties. They contended that it was not incumbent on them to inform the vendor, their principal, of what they were doing, because it was so common a practice that he must have known of it and been a consenting party. I am satisfied that their own story that Capon was bidding for them is untrue; but if it had been true they would certainly, in spite of any conceivable practice have been under a duty to make the fullest disclosure to their principal. This is the third respect in which they stand convicted on their own evidence of a total disregard of their legal duty.

But I do not for a moment accept the story of any practice, still less of a trade custom of auctioneers such as they gave in evidence. If they really meant to swear to a widespread practice that stock knocked down at auction, instead of being purchased and paid for by the bidder (or the third party for whom he is bidding), is secretly purchased by the auctioneer through the bidder as his agent, so that it becomes the property of the auctioneer, I do not believe their evidence; it was denied by Capon; and their own books belie it. Indeed their failure to make any disclosure to the vendor, and the complete absence from their minds of any idea that there was anything calling for disclosure, in my opinion show that there was no reality in their story of the prevalence of the tortuous practice of a sort of secured credit such as that by which they were trying to forestall Capon's unsecured creditors. Such a practice would, of course, mean that the auctioneer employed to sell does not sell at all, but simply retains his principal's stock, whilst pretending that he has duly sold it, and that the cheque he sends is the price paid by the independent purchaser to whom it was knocked down.

None the less it is not possible wholly to disregard the appellants' evidence that some kind of general practice does obtain ; the more so as Knights' agistment ledger and journal do show that they were giving credit to many other farmers besides Capon. There is nothing to justify an inference that secured credit was given, but the evidence does point to the frequency of an unsecured personal credit being given by auctioneers to farmers. Till 1928 there was no legislative attempt to set up in England any public system of short-term agricultural credit. The need had not been recognized by Parliament. All through the nineteenth century, before the amalgamation of the innumerable local private banks into a few large almost semi-public concerns with branches all over the country, the local banker knew personally all the farmers of his district and their relations, and the family history and financial expectations of his customers, and knew when he could take the risk of giving purely personal credit. But as the private banks became amalgamated into the "Big Five" of the present day, the personal touch disappeared or became less effective. In place of the former banking assistance there grew up, as is well known, a widespread practice of agricultural merchants providing personal credit, especially for seeds, fertilizers and feeding-stuffs ; and I do not doubt that the practice of auctioneers giving credit to farmers buying stock grew up in the same way. To do so would involve no breach of an agent's duty, as the loan of money to pay the purchase price would not concern the vendor ; the auctioneer's duty would have been discharged.

I have no doubt that that was the real transaction on each occasion in the present case, nor do I doubt that the practice is common in England : and that to this extent the appellants were speaking the truth. Had they tried to find a witness, as they boasted they could, to prove their fantastic story of a custom for auctioneers to put up farmers as dummies to bid on their behalf they would have failed; and that, I have no doubt, is why they did not try. We need not decide whether the appellants knew that the property was in Capon and not in them, or whether they really thought that it had somehow passed to them; for their misconception would not matter. The property was always in Capon: the story of his buying for them was untrue; and the agistment note was in that sense a sham.

I have discussed the facts at length for two reasons. A careful analysis of the evidence was necessary, in order to draw the right inferences. In the second place the subject of short-term agricultural credit is one of great importance to the agricultural industry, and both the evidence given by the auctioneers, and the true facts of the case help to throw light on the needs, the difficulties and the dangers connected with that subject. The manufacturer through an acceptance with or without documents attached at so many months directly or indirectly gets that length of credit for his purchase of raw materials. "Feeding" pigs or other store stock are the farmer's raw material, which he converts into his finished product: but the use of the bill of exchange has not been found practicable in agriculture, and some other credit method is needed. It is common knowledge that this is largely provided by merchants, and it may well be, also by auctioneers, and if the rates are reasonable a useful service is rendered to farmers; such credit, however, has its drawback; it tends to commit the farmer to the one channel of sale, and thereby to limit his market freedom. To do them justice the appellants in the present case, if their improper attempt to obtain security be put on one side, did not unfairly hamper Capon's market freedom: but the very fact, that their story was so plausible as to persuade so good a judge as His Honour Judge Hildesley of its truth, shows how dangerous such irregular methods of credit may be in their reactions upon unsecured creditors. I notice in Capon's bankruptcy file which was produced to us that even the Eastern Counties Farmers' Trading Society, a well known agricultural co-operative society with an established reputation for good management, is a creditor for a large sum. I am glad to think they will now get their pro rata share of the pig money.

It would be of general service to the agricultural community if the Minister of Agriculture could publish a full return annually of the working of the Agricultural Credits Act, 1928.

The appeal must be dismissed with costs.

Clauson L.J. At the hearing of this appeal counsel for the appellants failed to satisfy me that the result reached by the Divisional Court was otherwise than correct. The full analyses of the facts contained in the judgments of Scott and Luxmoore L.JJ. enforce and justify this conclusion and make it unnecessary for me to add more. I accordingly concur in the dismissal of this appeal with costs.

Luxmoore L.J. This appeal occupied a considerable period of judicial time and a large number of questions were raised in this Court and in the Courts below but when the material documents and the relevant evidence given at various stages of the proceedings in the county court and the arguments of counsel in this Court are considered the questions to be determined appear to fall within a small compass.

The original proceedings were started in the Ipswich County Court on February 21, 1939, by the trustee in bankruptcy of one Harry Urban Capon (to whom I will refer as the bankrupt) by two separate motions, one against a firm of auctioneers who at all material times carried on business at Stowmarket under the style of R. C. Knight & Sons, and the other against a firm who also carried on the like business at Stowmarket under the style of Woodward and Woodward. The two motions were subsequently consolidated and were heard together by His Honour Judge Hildesley who decided in favour of the auctioneers and dismissed the motions with costs. The claim made by the trustee in bankruptcy was that the proceeds of sale of 679 pigs taken by the auctioneers from farms occupied by the bankrupt a few weeks before the adjudication and without his consent should be repaid to the trustee in bankruptcy. The trustee in bankruptcy appealed to the Divisional Court where the appeal was allowed. The auctioneers now appeal to this Court from the decision of the Divisional Court and ask that the order of the learned county court judge may be restored. The fundamental question to be determined is, was the property in the 679 pigs so sold in the bankrupt or in the auctioneers.

It is necessary to state the material facts and to bear in mind that in bankruptcy proceedings the findings of the county court judge are open to review in the Divisional Court or in this Court when exercising its jurisdiction in bankruptcy, for in all bankruptcy proceedings wherever commenced any appeal is by way of rehearing. (See s. 108 of the Bankruptcy Acts, 1914 to 1926; rr. 3 and 134 of the Bankruptcy Rules, 1915, as amended; and Order LVIII., r. 1 of the Supreme Court incorporated in the latter of the two rules referred to.) In this respect the position is different from that with regard to findings of fact by a county court judge when exercising his ordinary jurisdiction. I only refer to this because of the statement at the beginning of the judgment of the Divisional Court. (1)

The material facts are as follows: The bankrupt was a farmer occupying and carrying on his business at several farms in Suffolk, in the neighbourhood of Stowmarket. He had carried on that business over a long period with varying success or want of success. He had executed an assignment for the benefit of his creditors in the year 1927 when his liabilities amounted to about 67,000*l.* A member of the firm of Messrs. Woodward and Woodward was the trustee of this deed. In December, 1934, the bankrupt was anxious to deal in pigs and for this purpose he desired to buy pigs in the local markets and after fattening the pigs on one or other of his farms to resell them at the best price obtainable. He had little or no ready money. Accordingly he approached Messrs. Woodward and Woodward in December, 1934. As the result of his conversations with Mr. Gordon Woodward, a member of this firm, it was arranged that the bankrupt should bid for pigs at any of the periodical auction sales held by Messrs. Woodward and Woodward at Stowmarket. If the pigs were knocked down to the bankrupt the firm agreed to pay the vendor the price at which the pigs were knocked down, the pigs being taken by the bankrupt to one or other of his farms and fattened by him. When the pigs were fattened they were to be resold. If Messrs. Woodward and Woodward acted as the auctioneers on the resale they were to be entitled to a commission of 2½ per cent. on the resale price and the bankrupt was to repay to Messrs. Woodward and Woodward the original price paid for the pigs at the first auction. If the resale was effected through any other auctioneer or agent the bankrupt was to repay to Messrs. Woodward and Woodward the price paid for the pigs at the first auction, together with interest on that sum calculated at the rate of 5 per cent. per annum from the date when the original sale price was paid by Messrs. Woodward and Woodward to the original vendor down to the date of repayment. When the pigs bought at an auction sale were delivered to the bankrupt he was sent a bought note showing the number of pigs bought and the price paid for them and in accordance with an arrangement made between Messrs. Woodward and Woodward and the bankrupt the latter signed a receipt in a form prepared by Messrs. Woodward and Woodward. The following is a typical example of the receipt given by the bankrupt: " Received of "Messrs. Woodward & Woodward, Auctioneers, Station Road, "Stowmarket, 36 feeding pigs costing 134*l*. 4*s*. which I agree "to feed and see after for the said Woodward & Woodward. "I acknowledge the pigs are their property and may be "removed and sold by them at any time." The receipt was signed by the bankrupt. The substance of this arrangement is set out in two letters, the one dated December 18, 1934, from Mr. Gordon Woodward to the bankrupt and the other dated December 21, 1934, is from the bankrupt to Mr. Gordon Woodward. [His Lordship read the two letters.]

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(1) Ante, pp. 151, 154.

In the books of account of Messrs. Woodward and Woodward, some of which were produced to the Court of Appeal, the transactions between that firm and the bankrupt are entered on both the debit and credit sides in exactly the same manner as one would expect transactions between a person buying goods on credit and paying for them from time to time would be entered, the only difference being that when an entry was made on the debit side of the account in respect of pigs bought, the number of pigs included in each purchase is stated in the margin. When the pigs were bought under the arrangement a bought note in the form usually given to purchasers at auction sales was sent by Messrs. Woodward and Woodward to the bankrupt and when any of the pigs fattened by the bankrupt were resold by auction by Messrs. Woodward and Woodward a sold note in the form usually given to vendors was sent by that firm to the bankrupt. On every resale the whole of the money produced at that sale was paid over to the bankrupt who thereupon sent to Messrs. Woodward and Woodward a cheque for the original purchase price of a specified number of pigs although on occasions a number of pigs in excess of the specified number were sold at the particular auction.

Arrangements similar to those above stated were made between Messrs. R. C. Knight & Sons and the bankrupt, but dealings in pigs thereunder did not start until January, 1935. A number of books kept by Messrs. R. C. Knight & Sons were shown to us and we had the advantage of an explanation by their book-keeper of the books so produced. It was agreed by counsel for the respective parties that the information appearing from the books produced and the explanations given to us by the book-keeper should be treated as being properly in evidence before this Court. I need not restate what the result of the information and explanations were as they have already been stated in full by my Brother Scott.

Both Messrs. Woodward and Woodward and Messrs. R. C. Knight & Sons sought in the affidavits filed on their behalf and in the oral evidence adduced in the county court to establish that the bankrupt purchased all pigs bought at

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auctions held by either of them as agent for the firm which held the auction, but this was denied by the bankrupt in his affidavits in reply and also in his evidence before the county court judge. It was argued that if the bankrupt was the agent for the auctioneers respectively then the property in any pigs bought by him in that capacity passed to the auctioneers for whom the bankrupt was acting on payment to the vendors for the particular pigs. I am prepared to accept this argument for the purposes of this case although it is I think material to point out that, if the auctioneers without the knowledge of the vendors became the purchasers of pigs offered for sale by them, any vendor would be entitled to challenge the transaction and have the purchases so made set aside.

This argument was not dealt with expressly by the county court judge although as pointed out by the divisional court his judgment can only be founded on the assumption that such agency existed for there is no other explanation to support the view that the property in pigs knocked down to bids made by the bankrupt passed to the auctioneers. The auctioneers respectively allege that such an agency existed, the bankrupt denies its existence. The only safe guide in the circumstances is to ascertain what in fact happened when pigs were knocked down to the bankrupt. It is common ground that the only interest which the auctioneers had in pigs so dealt with was either a commission at the rate of 2½ per cent. on the sale price of such of them as were resold by the auctioneers at auction sales held by them or if resold through any other agency a sum calculated at the rate of 5 per cent. per annum (not at 5 per cent. on the resale price as stated in the headnote to the report of the case. (1)) These facts are certainly far more consistent with a purchase by the bankrupt for his own benefit than a purchase by him as agent for the auctioneers. But the matter does not end here. It is common ground that after pigs were knocked down to the bankrupt they were at his risk and not at the risk of the auctioneers. Moreover the auctioneers had no voice in fixing the price to be bid by the bankrupt nor in the selection of the particular pigs to be

(1) Ante, p. 151.

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bought. The bought and sold notes are inconsistent with the auctioneers contention; and with the sole exception of the reference in the books of Messrs. Knight & Sons to agistment transactions, the relevant entries in the books of both Messrs. Woodward & Woodward and Messrs. Knight & Sons are more consistent with the view that the bankrupt was the purchaser than the view that he was acting as agent for the auctioneers. The only circumstance in support of the contrary view is the form of the receipt given by the bankrupt when he took delivery of pigs bought at auctions held by the auctioneers. It is said that these receipts are evidence of the existence of an agreement between the auctioneers and the bankrupt for the agistment of pigs. The features of an agistment agreement are well known. The essentials are first that the animals to be agisted are the property of the person delivering them to the farmer, and they remain that person's property. The farmer's obligation is to feed the animals and deliver up those animals to the owner on demand, but the animals are not at his risk. He is only liable for injury arising from negligence or neglect of reasonable and proper care of the animals. All the farmer gets out of the agreement is the agreed remuneration for feeding the animals. On the submission made on behalf of the auctioneers they are under no liability to pay for the feeding of the pigs, they run no risk of loss if any of them die owing to causes for which the bankrupt is not responsible and once the pigs have been delivered to the bankrupt they have no further financial interest in them, provided the original purchase price is paid, than to receive a commission if they resell any of them at auctions held by themselves at the same rate as they obtained from the original vendors, namely, 2½ per cent. on the sale price, or, and this is perhaps the most significant feature of the transaction, interest at the rate of 5 per cent. per annum on the original purchase price paid for the pigs for the period between the date when the original purchase price was found by the auctioneers and its repayment to them by the bankrupt. It is in my judgment improper to describe the arrangements between the auctioneers and the bankrupt as constituting agistment agreements.

The material documents and the facts proved in this case lead only to one conclusion and that is that the bankrupt when bidding for pigs at auctions held by the auctioneers was not acting as their agent but for himself and that he became the purchaser of such pigs as were knocked down to him. On this aspect of the case there can be no room for doubt but that the property in pigs purchased passed to the bankrupt under s. 17 of the Sale of Goods Act. This being so the so-called agistment agreement was inoperative to pass any property in the pigs in question from the bankrupt to the auctioneers and in so far as it purports to confer on the auctioneers a right to seize the pigs is void because it is admittedly in contravention of the provisions of the Bills of Sale Act, 1882.

The auctioneers entered on the bankrupt's farm on February 23 and 24 and removed therefrom 679 pigs without the bankrupt's consent. These pigs were sold by the auctioneers for the sum of 4408*l.* 2*s.* 3*d.* The auctioneers retained out of this sum the sum of 4179*l.* 3*s.* 0*d.* and paid to the trustee in bankruptcy the sum of 228*l.* 19*s.* 3*d.*, being the amount by which the total net proceeds of sale exceeded the total amount due to the auctioneers for the moneys advanced for the purchase of pigs and the cost of removal of the pigs to the place of sale.

The divisional court was, in my judgment, right in discharging the order of the county court judge and ordering the auctioneers to repay to the trustee in bankruptcy the proceeds of sale after deducting the sum of 228*l.* 19*s.* 3*d.*, which has been already paid to him.

The appeal fails and must therefore be dismissed. The appellants must pay the costs of this appeal.

*Appeal dismissed.*

Solicitors: *Field, Roscoe & Co., for Gotelee & Goldsmith, Ipswich; Herbert Smith, for Westhorp, Cobbold & Ward, Ipswich.*

H. C. G.

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April 5.

# *In re* A DEBTOR.

## *Ex parte* THE JUDGMENT CREDITORS *v.* THE JUDGMENT DEBTOR.

[No. 266 of 1940.]

*Bankruptcy—Debt payable by a sum of* 10*l. on February* 1, 1940, *and* " 10*l. per month thereafter* "*—Subsequent instalments payable on first day of each calendar month—R. S. C., Order* LXIV., *r.* 1.

Where an order was made that execution in respect of a judgment debt should be suspended provided that " 10*l.* be paid " on the 1st February, 1940, and 10*l.* per month thereafter " :—

*Held,* that March 1, 1940, was the last day for payment of the second instalment and that each subsequent instalment became payable on the first day of each subsequent calendar month.

Appeal from Mr. Registrar Parton.

On January 11, 1940, an order was made that judgment creditors for the sum of 154*l.* 19*s.* 3*d.* and costs be at liberty to issue execution on or otherwise proceed to the enforcement of the judgment and it was further ordered "that execution "be suspended provided that 10*l.* be paid on the 1st February, "1940, and 10*l.* per month thereafter."

The first instalment was paid on January 26, 1940. As the judgment creditors had not received the second instalment before March 2, 1940, they caused a bankruptcy notice to be issued against the debtor. A tender of the amount was made on March 5, 1940, but this was not accepted.

On March 14, 1940, an application was made to Mr. Registrar Parton for the setting aside of the bankruptcy notice and he set aside the notice on the ground that no definite date had been fixed within the month of March on which the payment was to be made. From this order the creditors appealed. The appeal was heard on April 5, 1940.

*R. F. Levy K.C.* and *Cyril Salmon* for the appellants (the creditors). With regard to the first instalment, the latest date for payment was February 1, 1940. The succeeding month began on February 1 and the second instalment should have been paid before midnight on March 1.

"Thereafter" means "running from that date." R. S. C., Order LXIV., r. 1, provides that the word "month" in any document, which forms part of any procedure under the rules, means "calendar month."

They referred to *Radcliffe* v. *Bartholomew*. (1)

*Sebag Shaw* (with him *Alban Gordon*) for the respondent (the debtor). In Lewis and Short's Latin-English Dictionary the word "per" is defined as "through, throughout, during, "for." The words "per month" are strengthened by the presence of the word "thereafter." The meaning of the phrase is that a payment of 10*l.* is to be made in each month after the month of February. The month in which the second payment was to be made would begin on March 1. The most favourable construction, from the point of view of the judgment debtor, ought to be given to the language of the order.

SIR WILFRID GREENE M.R. This appeal raises a curious little point on the construction of an order made by Master Jelf on January 11, 1940. The matter arises in this way. The present appellants obtained a judgment against the respondent, and then applied for leave to issue execution on or otherwise proceed to the enforcement of the judgment under s. 1 of the Courts (Emergency Powers) Act, 1939. That liberty they obtained, subject to a provision which was inserted in the order to the following effect: "And it is "further ordered that execution be suspended provided that "10*l.* be paid on the 1st February, 1940, and 10*l.* per month "thereafter." The respondent duly paid the 10*l.* on February 1. The next payment of 10*l.* was in fact not paid till March 5, for reasons into which it is not relevant to enter. We are not concerned here with the merits of the matter, but with a bare question of law. The payment not having been made on March 1, which was the latest date on which the appellants contended it ought to have been made, a bankruptcy notice

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(1) [1892] 1 Q. B. 161.

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was issued on March 2. That was followed by an application by the respondent, the debtor, to set aside the bankruptcy notice. Mr. Registrar Parton acceded to that application and set aside the bankruptcy notice; and from his decision the present appeal is brought.

The contention which found favour with the learned registrar was that on the true construction of the provision in the order which I have read, the debtor had the whole of the month of March in which to pay the second instalment, and, accordingly, that payment having been made on March 5, no default had occurred.

As against that, it is contended by the judgment creditors, the appellants, that the last day for the payment of the second instalment was March 1; that, accordingly, there was a default; and that the bankruptcy notice was properly issued.

The point is a very short one. We start off with this, that in this order the word "month" has to be construed as meaning "calendar month," pursuant to the provisions of R. S. C., Order LXIV., r. 1. Accordingly, the phrase "10*l.* per "month thereafter" must be construed as "10*l.* per calendar "month thereafter."

In approaching a matter of this kind, I do not think it is putting it too high to say that one expects to find that the periodical payments which are contemplated will fall to be made at regular intervals. True it is that if the language points to irregularity, it must be given its full effect. But I think we are entitled to approach the construction of this phrase with a leaning—I put it no higher than that—towards regularity in the intervals for payment. The contention which found favour with Mr. Registrar Parton leads to irregularity in the periods of payment of a very strange kind. If the argument is correct, the second payment could be made on March 2, the next payment on April 3, the next payment on May 4, and so on, or at other intervals. But, when the last day of a month had been reached by that process, for example, the end of August, the next payment would have to be made in the month of September, and there would not be more than a month for that particular payment:

in other words, the irregularity in the intervals of payment would automatically come to an end in that way. If the order, when properly construed, has a meaning of that kind, due effect must be given to its language: but, in my opinion, that is not the meaning of this order. The phrase, if I may repeat it again, is "10*l.* to be paid on the 1st February, 1940, "and 10*l.* per month thereafter." The word "thereafter" points to some time as from which the subsequent months are to be calculated. The construction put forward by the respondent is that the word "thereafter" refers to the month of February; and, accordingly, when the order says "10*l.* "to be paid on the 1st February, 1940, and 10*l.* per month "thereafter," it means that for every calendar month subsequent to the month of February a payment of 10*l.* is to be made; and that would mean that the months there referred to would be the named months of the calendar.

That construction would obviously be very much more difficult if the date for the first payment was not February 1, but some other date in February: but, quite apart from that, I cannot construe the word "thereafter" as referring to the month of February. In my opinion it refers to the date on which the first payment is to be made, namely, February 1.

The problem, therefore, is to find out what is the latest date in relation to each month that the payment of 10*l.* must be made. If the months thereafter are to be calculated from February 1, the second month would begin at midnight on the 1st–2nd of February and would end at midnight on the 1st–2nd March. Accordingly, the last day for payment of the second instalment would be March 1, and so on in the subsequent months—the last day for payment would be April 1, and so on. That appears to me to be the true meaning which should be given to the word "thereafter." That construction, to my mind, has the great advantage of producing that regularity in the payments of instalments which one would expect to find in an order of this sort.

The point is a very short one: but, in my opinion, the learned registrar was in error when he construed the order as he did; and he ought to have dismissed the application to set aside

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the bankruptcy notice. In my opinion, therefore, this appeal should be allowed with costs here and below.

SCOTT L.J. I agree.

LUXMOORE L.J. I also agree.

Solicitors: *Woolfe & Woolfe; J. F. B. Satchell.*

J. L. D.

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## *In re* WICKS' MARRIAGE SETTLEMENT.

## PUBLIC TRUSTEE *v.* WICKS.

FARWELL
J.

1940
March 18.

[1937. W. 3484.]

*Legitimacy—Marriage settlement—Power of appointment to issue of marriage—Child of spouses born before marriage—Whether permissible object of power—Legitimacy Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *ss.* 1, 3.

By a marriage settlement executed in 1893 it was provided that after the death of the wife, who was given a life interest in the settled property, it was to be held in trust for all or any one or more of the issue of the spouses as the husband should appoint and, subject to any appointment, for such of the issue of the marriage as being male should attain the age of twenty-one years, or being female should attain that age or marry. The year before the marriage a child had been born of whom the spouses were the parents:—

*Held*, that although the child became legitimate by virtue of the Legitimacy Act, 1926, he was not a child of the marriage and accordingly was not an object of the power of appointment.

Adjourned Summons.

Lionel Arthur Wicks, the second defendant, was born on August 2, 1892. His parents, Arthur William Joseph Wicks, the first defendant (hereinafter called "the father"), and Selina Darton (hereinafter called "the mother"), were married on February 23, 1893. They subsequently had three children: (1.) Sylvia Baker, the third defendant, born on November 15, 1893, the mother of Allen Baker, the fourth defendant; (2.) William Wicks, born on October 14, 1895, who died intestate on January 20, 1919; (3.) a son who died in early infancy. The mother died on June 2, 1937. The father had been adjudicated bankrupt in 1894. He had not obtained his discharge, and the Official Receiver was the fifth defendant.

Under the marriage settlement of the father and the mother, dated February 23, 1893, the income of the settled property was to be paid to the mother during her life. After her death the settled property was to be held "upon trust for all or "any one or more of the issue of the said Arthur William "Joseph Wicks and Selina Darton (such issue to be born "and to take vested interests within twenty-one years after "the death of the survivor of the said Arthur William Joseph "Wicks and Selina Darton) for such interest or interests, "upon such conditions and in such proportion, manner and "form (whether with or without powers of advancement) "as the said Arthur William Joseph Wicks by deed, will or "codicil shall appoint, and, subject to any such appointments "or appointment and in so far as the same shall not extend, "upon trust for such issue of the said marriage as being male "shall attain the age of twenty-one years or being female "shall attain that age or marry, and, if more than one in "equal shares, and if there be no such issue and subject to "any interest which may be indefeasibly acquired by any "person under any of the foregoing trusts and to any advances "which may be made under the power in that behalf contained "upon trust for the said Arthur William Joseph Wicks "absolutely."

On October 25, 1937, the Public Trustee, as trustee of the settlement, took out a summons to determine (inter alia) whether on its true construction and in the events which had happened, a child born before the date of the marriage was a permissible object of the power of appointment given to the father or was entitled to a share in the trust estate in default of appointment.

On February 7, 1938, Simonds J., in Chambers, directed an inquiry (1.) whether the father was ever married to the mother and, if so, when the marriage was solemnized; and (2.) whether there were any and, if any, what children of the marriage and when they were born. On July 25, 1939, the Master certified that the father and the mother were married on February 23, 1893, and that there were four children of the marriage, one of whom was Lionel Arthur Wicks, born on August 2, 1892. A summons to vary the certificate was taken out on October 19, 1939, on behalf of the Official Receiver.

On February 22, 1940, the father, by deed, appointed the whole of the trust fund to Lionel Arthur Wicks absolutely.

*H. A. Rose* for the plaintiff.

*A. Guest Mathews* for the first defendant.

*C. B. Guthrie* for the second defendant. A child legitimated by the subsequent marriage of his parents becomes a child of the marriage: *Green* v. *Green.* (1) The Legitimacy Act, 1926, must mean that when the parents marry and comply with the conditions laid down by it the child becomes a legitimate child of the marriage.

The effect of the exercise of the power of appointment in this case was to divest the estates limited in default of appointment and to create a new estate in this defendant: Farwell on Powers, 3rd ed., p. 310. Further, the document exercising the power and not the document creating the power was the instrument under which the appointed interest arose: *In re Dickinson's Settlements. Bickersteth* v. *Dickinson.* (2) Only the date of the disposition under which the interest was created is to be looked at. That disposition being the date of appointment, this defendant is entitled to benefit under it, since the power was exercised after the Act came into force and a new estate was thereby created in a person who at that time was a legitimate child of the marriage.

*Herbert Hart* for the third and fourth defendants. Each of the three children born after the marriage obtained a vested interest in the settled fund. Their estates limited in default of appointment were liable to be divested only on an appointment made in favour of one of them. A person who, though legitimate, is not one of them cannot be an object of the power of appointment: *In re Hepworth. Rastall* v. *Hepworth.* (3) Lionel Arthur Wicks could only claim to be an object of the power under the settlement, which was a disposition taking effect before the Legitimacy Act, 1926. Accordingly he does not come within the provision of s. 3, sub-s. 1 (*b*), and he cannot take an interest under it.

*T. A. C. Burgess* for the fifth defendant.

FARWELL J. [having stated the facts:] It cannot, in my judgment, be true to say that the defendant Lionel Arthur Wicks was a child of the marriage; he is a legitimate child of the spouses, but he is not a child of the marriage because in fact he was born before his parents were married. The form of the certificate is not accurate and it does not preclude any argument in this Court upon the question whether or not Lionel Arthur Wicks is entitled to participate in the marriage settlement fund.

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(1) [1929] P. 101, 102, 104.
(2) [1939] Ch. 27.
(3) [1936] Ch. 750.

Reference has been made to a rule stated in Farwell on Powers, 3rd ed., p. 310, which is perfectly well recognized: "The exercise of a power of appointment divests (either "wholly or partially according to the terms of appointment) "the estates limited in default of appointment and creates "new estates, and that, too, whether the property be real or "personal." That is a correct statement of the law as to the effect of the exercise of a special power of appointment. It is said that the power having been exercised after the date of the coming into force of the Legitimacy Act, 1926, it must follow that a new estate was created in a person who at that time was a legitimate child of his parents and that he was a person in whose favour the power could be validly exercised. No doubt it is true that a new estate is created by the exercise of a power of appointment, subject only to this, that the person in whom the new estate is created must be an object of the power. It is quite plain that an appointment to a stranger purporting to be made under a special power would create no interest whatsoever. This property is subject to a special power of appointment with a gift over in default of appointment. It is vested in the persons entitled in default of appointment, subject only to the possibility of being divested by a valid exercise of the power. By the exercise of the power the gift in default of appointment is pro tanto defeated and a new estate is created in the person or persons in whose favour it is exercised, but that can only occur where there is an appointment to an object of the power. It is quite plain that an appointment to a stranger can have no operation whatever.

Therefore, it is necessary to look at the settlement itself to see who are the persons in whose favour an appointment can be made, and also who are the persons in whom the property is vested in default of appointment. In my judgment, it is clear that the only persons who are objects of the power and who apart from the settlor himself are entitled in default of appointment, are those persons who are either the children or the issue of the marriage of the two spouses. An estate limited in default of appointment became vested in each of the children of the marriage at its birth, and an appointment must be to issue of the marriage. Lionel Arthur Wicks was never a child of the marriage at all. As the result of the Legitimacy Act, 1926, he has become legitimate, but the Act does not say, and, in my judgment, does not intend to provide, that such a person shall become a child of the marriage of his parents. What the Act does is to take away from a child born out of wedlock the disability which attaches to an illegitimate person and, subject to certain restrictions, it gives that person all the benefits which result from being legitimate. It does not make him a child of the marriage because he was born before the marriage ever took place at all. The Act provides by s. 1, sub-s. 1, that the subsequent marriage of the parents of an illegitimate child shall legitimize him as from the date of the marriage or the commencement of the Act, whichever last happens. The legitimation of a person under this Act gives him the rights of a legitimate child subject to certain restrictions.

By s. 1, sub-s. 3: " The legitimation of a person under "this Act does not enable him or his spouse, children or "remoter issue to take any interest in real or personal property "save as is hereinafter in this Act expressly provided." By s. 3, sub-s. 1: " Subject to the provisions of this Act, a "legitimated person and his spouse, children or more remote "issue shall be entitled to take any interest—(*a*) in the estate "of an intestate dying after the date of legitimation; (*b*) under "any disposition coming into operation after the date of "legitimation . . . . " Therefore, the problem is whether the exercise of the power of appointment can be treated as a disposition coming into operation after the date of legitimation,

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and, if it can be so treated, whether it can effect a valid appointment. In order to determine those questions one has to look at the power which is created by the settlement. In my judgment, the answer must be that while a valid exercise of the power of appointment does create a new estate in the person in whose favour it is exercised and destroys pro tanto the estate which is vested in default of appointment, to have that effect it must be shown that the person in whose favour the power has been exercised is an object of it.

When one looks at this settlement, there can be, in my view, only one answer to the question raised. Lionel Arthur Wicks was not a child of the marriage and, therefore, is not an object of the power. The fact that he has now become a legitimate child does not make him an object of the power, he not being in fact a child of the marriage although he no doubt is a child of the two named spouses.

Solicitors: *Gerrish & Foster; Ronald L. Meech; Leslie J. Griffin; Bird & Bird; Tarry, Sherlock & King.*

F. H. C.

FARWELL J.

1940 April 5.

# *In re* TAYLOR.

# MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* SMITH.

[1940. T. 115.]

*Will—Residuary gift—Trust for fund for benefit of bank staff—Voluntary association—Whether gift valid.*

A testator directed his trustee to stand possessed of his residuary estate in trust for the Midland Bank Staff Association, Liverpool and District Centre, " Edgerley Taylor Fund," which he had himself constituted and which was governed by a constitution and rules setting out its objects. These were (inter alia) to give financial assistance " to past and present members of the " staff of the Midland Bank, particularly those who have been " employed in Liverpool and District Branches or their " dependents " who might be in difficulty through sickness or other misfortune, to promote the efficiency of the staff, to foster social activities and recreation among them and to promote their general welfare. The trustee was to act in accordance with the instructions of the committee governing the fund:—

*Held*, that the members of the association were entitled to deal with the fund as they wished and to direct the trustee to divide it among them, putting an end to the provisions of the constitution and rules, and that, accordingly, the gift was valid. The fact that the trustee might have difficulty in determining what persons were members of the association did not invalidate the gift.

*Cocks* v. *Manners* (1871) L. R. 12 Eq. 574, and *In re Clarke Clarke* v. *Clarke* [1901] 2 Ch. 110, followed.

ADJOURNED SUMMONS.

By his will dated September 26, 1933, the testator, Sidney Edgerley Taylor, who died on October 4, 1935, appointed the plaintiff, the Midland Bank Executor and Trustee Co., Ld., executor and trustee thereof, and provided: " I direct the "company to stand possessed of the residue of my estate and "the investments from time to time representing the same "(herein called my ' residuary trust estate ') in trust for "the Midland Bank Staff Association, Liverpool and District "Centre, ' Edgerley Taylor Fund ' absolutely to be added to "the sums already presented for the constitution of such "fund and to be administered according to the constitution

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"and rules approved and adopted at a general meeting of the "said association in the year 1932 or any amendment thereof "which may be agreed by me and approved and adopted "by the said association, provided always that in the event "of the said Midland Bank Staff Association, Liverpool and "District Centre, having ceased to exist at the date of my "death I direct the company to stand possessed of my "residuary trust estate for the Liverpool University to found "a chair to be called 'The Edgerley Taylor Chair' to promote "the education of dental surgery in the University."

The constitution and rules referred to were as follow :—

"Whereas Mr. S. Edgerley Taylor, being desirous of expressing his appreciation of the services rendered to him by the "officers of the Midland Bank, Ld., in the Liverpool District, "has presented to the Liverpool and District Centre of the "Midland Bank Staff Association, hereinafter called the "Liverpool Centre, the sum of 200*l.* and has expressed his "intention to constitute the Liverpool Centre his residuary "legatee under his will, a fund is herein constituted for administering the moneys so presented and hereafter to arise under "the said will.

"(1.) This fund shall be known as the Midland Bank Staff "Association, Liverpool and District Centre, Edgerley Taylor "Fund.

"(2.) The objects of the fund shall be (*a*) to render financial "assistance to past and present members of the staff of the "Midland Bank, particularly those who have been or are "employed in Liverpool and District Branches, or their "dependents who may be in genuine difficulties through "sickness or other misfortune, and to assist any scheme "which has for its objects the betterment of the health of "members of the staff. (*b*) To give financial support to any "institution or organisation which has for its object or one "of its objects the welfare of past and present members of "the staff of the Midland Bank, particularly those who have "been or are employed in Liverpool and District Branches, "or their dependents, and to any other charitable institution "or organisation deemed worthy of such support. (*c*) To "promote and encourage the efficiency of the staff of the "Midland Bank. (*d*) To foster the development of social "activities and recreation among the staff of the Midland "Bank. (*e*) To promote the general welfare of the staff of "the Midland Bank.

"(3.) (*a*) The fund shall be governed by a committee consisting of not more than seven, of whom four shall form a "quorum. The committee of the fund shall include ex officio "the chairman, deputy chairman, treasurer and secretary of "the committee for the time being of the Liverpool Centre. "The other members as required shall be elected by ballot at "the annual general meeting of the Liverpool Centre. . . . . "(*b*) Any vacancy in the committee may be filled by resolution "of the committee of the Liverpool Centre. . . . .

"(4.) (*a*) The trustees of the fund shall be the Midland "Bank Executor and Trustee Co., Ld., in whose name all "surplus funds and property of the fund shall be held and "the trustees shall act in accordance with the instructions of "the committee who may depute any one of their number to "act for them jointly with the secretary for the purpose of "transacting the business of the fund in conformity with the "resolution of the committee for the time being in force, but "it shall not be the duty of any other person or persons who "may be called upon to do any act or thing under the instruction or direction from the before-mentioned two duly "authorised officers of the fund to ascertain that such instruction or direction is in conformity with the resolutions of the "committee. (*b*) All moneys received on account of the fund "shall be credited to the account of the fund with the Bank "and any surplus available for investment shall be invested "from time to time in the names of the trustees as the "Committee may direct. . . . ."

On January 16, 1940, the plaintiff took out a summons to determine whether the gift of the residuary estate of the testator was valid.

*J. Neville Gray K.C.* and *G. Maddocks* for the plaintiff.

*Charles Harman K.C.* and *Edward Ackroyd* for members of the committee of the fund. There is no room for the contention that the gift is bad for uncertainty or vagueness. It is a gift to a voluntary association which is absolutely entitled to the fund, so that the members could divide it up among themselves. Under the constitution and rules the members could do a variety of things with the fund, some of which are charitable and some not charitable, but they are entitled to put an end to the constitution and rules. When such a gift as this is made the donor has nothing to do with the use to which the recipients put it. They may spend it, or bury it, or take it to Monte Carlo and gamble with it. In connection with this gift the principles laid down in *Cocks* v. *Manners* (1) and *In re Clarke. Clarke* v. *Clarke* (2) apply. *In re Clarke* (2) was followed in the cases of *In re Drummond. Ashworth* v. *Drummond* (3) and *In re Prevost. Lloyds Bank, Ld.* v. *Barclays Bank, Ld.* (4) As to the persons who are to benefit by this gift, the testator was clearly referring to the Midland Bank Staff Association, Liverpool and District Centre. The gift is to that voluntary association. It is not made vaguely to the staff generally.

*H. B. Vaisey K.C.* and *A. Guest Mathews* for the widow of the testator. This gift is not charitable and it is void for uncertainty. It is a gift not to any named persons but to a fund already established by the testator for certain objects and subject to certain rules. The expression "past and present "members of the staff of the Midland Bank" is so vague and uncertain that the Court cannot give effect to the trust. In the case of *In re Patten. Westminster Bank, Ld.* v. *Carlyon* (5) legacies given by the testator to certain clubs were held not to be charitable and accordingly to be invalid. This case was unlike *In re Clarke* (2), since here the constitution and rules prevented the persons intended to be benefited from putting an end to the trust at will. They referred to *In re Ashton. Westminster Bank, Ld.* v. *Farley* (6) and *In re Amos. Carrier* v. *Price.* (7)

(1) (1871) L. R. 12 Eq. 574.

(2) [1901] 2 Ch. 110.

(3) [1914] 2 Ch. 90.

(4) [1930] 2 Ch. 383.

(5) [1929] 2 Ch. 276.

(6) [1938] Ch. 482; [1939] A. C. 430.

(7) [1891] 3 Ch. 159.

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*Hon. Charles Romer K.C.* and *Hon. Denys Buckley* for the daughters of the testator. The distinction between *In re Clarke* (1) and the present case is found in the fact that this is a gift not to the members of the association but to a fund vested in trustees.

*Charles Harman K.C.* in reply.

FARWELL J. [having stated the facts:] The question is whether the gift to the association is valid. Both Mr. Vaisey and Mr. Romer, who appear respectively for the widow and the daughters of the testator, have said that they do not desire to argue that it is bad as offending the rule against perpetuities or as tending to a perpetuity. But they have contended first that this gift is not charitable, and secondly that it is a gift to no named persons and is directed to be held upon trusts, set out in the constitution and rules, which are so vague and so uncertain that the Court cannot give effect to them. As an instance of the uncertainty they say that no one can ascertain for certain what is meant by "past "and present members of the staff of the Midland Bank" and that as, in those circumstances, no effect can be given to the gift, the whole of the testator's residuary estate is undisposed of and passes to his next of kin, who are his widow and his two daughters.

In the first place, I may say at once that I have grave doubts whether all the trusts contained in this document are charitable, although it is not necessary, in the view which I take of this matter, finally to decide that point. There is no doubt that some of them may be so, but there are purposes for which the fund may apparently be used which, in my judgment, are outside the proper definition of charity, and consequently the fund as a whole cannot be said to be held upon charitable trusts. The question, therefore, comes to this: Having regard to the fact that I do not propose to treat this as a gift for charitable purposes alone and, therefore, as a good charitable gift, is there any ground upon which it can be held that it does not take effect?

(1) [1901] 2 Ch. 110.

As a matter of construction this is, in my view, a gift for the purposes of the association, and under the constitution and rules governing it such moneys as may come to it are payable to the Midland Bank Executor and Trustee Company, Ld., which is to hold all surplus funds and property and deal with them in accordance with the instructions of the committee. This is a gift to the association, the hand to receive it being that of the trustee of that association. Of course it could not be suggested (and it was not suggested) that this is in any sense a gift to the trustee beneficially; the company must deal with it in accordance with the constitution and rules. But if the members of the body defined therein are entitled to put an end to the association and to direct the company to divide the funds in its hands among all the members there is nothing which can, in my opinion, render this gift invalid.

It may be difficult to ascertain what persons the "past "and present members of the staff of the Midland Bank" include; but that is primarily a matter for the trustee, in whose hand the money is, to determine. The fact that there may be a question with regard to that does not in itself render this gift invalid. It is in truth a gift to an association, the funds of which may be dealt with in accordance with the wishes of the members, for there is nothing, so far as I can see, in the rules which regulate it to prevent the whole concern being wound up and the fund being distributed among the persons who are entitled to it.

The matter seems to me to be covered by authority. I desire in the first place to refer quite shortly to the well known case of *Cocks* v. *Manners.* (1) In that case the question arose with regard to gifts to four religious institutions, including "the Dominican Convent at C., an institution "consisting of Roman Catholic females living together by "mutual agreement in a state of celibacy, under a common "superior, for the purpose of sanctifying their own souls by "prayer and pious contemplation, and the Sisters of Charity "of St. Paul at S.O., an institution composed of Roman

(1) L. R. 12 Eq. 574.

"Catholic women living together by mutual consent, whose "primary object was personal sanctification, and who, as a "means thereto, employed themselves in the exercise of "works of piety and charity in teaching the poor and nursing "the sick." The testatrix directed that payment in each case should be made to the superior for the time being of the institution.

Wickens V.-C. held: "that the community of sisters at S.O. "was a voluntary association and a charitable institution, "and that the bequest to them was good as to the pure "personalty." With regard to the gift to the Dominican convent he held that it was not charitable but that it was not void on the ground of perpetuity.

The only part of the judgment to which I wish to refer is at the end, where the learned Vice-Chancellor says this (1): "The question remains whether the gift to the Dominican "convent, which seems to me not charitable, is void for "perpetuity. It is argued that it is a gift in trust for the "purposes of a perpetual institution, and, therefore, on a "perpetual trust, and *Carne* v. *Long* (2) is relied upon. That "case does not, I conceive, decide that a gift to a perpetual "institution not charitable is bad—for instance, a gift to a "club, or to a limited company; but merely that the gift "in question there was a gift which the trustees could only "give effect to by holding the property (which seems to have "been all real estate) for ever, and applying the income "according to the rules. Nothing of that sort is directed here; "the gift is ordered to be paid to the superior for the time "being; and the superior, when she receives it, will be bound "to account for it to the convent—to put it, so to speak, "into the common chest; but when there it will be subject "to no trust which will prevent the existing members of the "convent from spending it as they please. It would, I "conceive, be an extreme stretch of the rule against perpetuity "to hold that it applies to a gift of this sort."

That decision was followed by Byrne J. in the case of *In re Clarke. Clarke* v. *Clarke* (3) to which I have been referred.

(1) L. R. 12 Eq. 574, 585.

(2) (1860) 2 De G. F. & J. 75.

(3) [1901] 2 Ch. 110.

That was the case of a gift "to the committee for the time "being of the Corps of Commissionaires in London to aid in "the purchase of their barracks, or in any other way beneficial "to that Corps." It appears from the headnote that: "The "Corps was founded shortly after the Crimean War in order "to find employment for discharged and disabled soldiers and "sailors." Byrne J., having reviewed many cases, held: "that, if and so far as the objects of the institution were "charitable, the gift was good; and if and so far as they "were not charitable, still it was a good gift, and did not "tend to create a perpetuity." So far as I can see it was not argued in that case that the gift was void on any other ground.

In the present case, I am not disposed, as at present advised, without hearing argument on the point, to take the view that this gift can be supported on the ground that it is charitable. In my judgment, the decision in the case of *In re Clarke* (1) really covers this case because it shows that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund or the purposes for which the institution was created prevent the members from dealing with it, both capital and income, in any way they please.

It seems to me that there is some confusion of thought in asking the Court to hold that the gift is bad on the ground that there is some ambiguity in the trusts relating to the purposes for which the fund is to be used. No doubt such a question might arise if there was any doubt whether or not the fund could be divided up amongst the members. If it was suggested that on the true construction of the trusts, only the income of the fund could be used, while the capital had to be retained, it might then become material to consider the nature of those trusts. But where there is a gift to an unincorporated body of persons and nothing in the rules or the constitution of that body which prevents them from using the fund so given to them in any way they please, either by applying the capital or the income to any of the purposes therein set out or by putting an end to the fund altogether and distributing it among themselves, the fact that there may be some difficulty

(1) [1901] 2 Ch. 110.

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in construing the exact meaning of the rules or the constitution is not a matter which can affect the validity of the gift itself.

This is a gift to a particular unincorporated body of persons who have for objects which seem good to them joined together in the form of an association. The fact that the trustees may have difficulty in determining exactly what persons or class of persons are members of the association seems to me in no way to invalidate the gift. If there is such difficulty the question can be decided by the Court in other proceedings as a matter of construction of the trust. The association has rules, but there is nothing in them to prevent it being put to an end to-morrow and the whole of the fund being divided up as the members should decide. In those circumstances, this is a case falling within the principle of the decision in *Cocks* v. *Manners* (1), relating to the gift to the lady superior of the Dominican convent, and of the decision in the case of *In re Clarke* (2), which has been followed by Eve J. in the cases of *In re Drummond. Ashworth* v. *Drummond* (3) and *In re Prevost. Lloyds Bank, Ld.* v. *Barclays Bank, Ld.* (4)

In my judgment, this is a gift to which the Court must give effect. I see nothing which prevents it from being valid and effectual, and I propose to make a declaration accordingly.

Solicitors: *H. E. Quick; Norris, Allens & Co.; W. P. Davies & Son; Fowler, Legg & Co.*

(1) L. R. 12 Eq. 574.
(2) [1901] 2 Ch. 110.
(3) [1914] 2 Ch. 90.
(4) [1930] 2 Ch. 383.

F. H. C.

BENNETT J.

1940

April 11.

# *In re* SYKES.

## YOUNGHOUSE *v.* SYKES AND OTHERS.

[1940. S. 1028.]

*Will—Option to purchase—Not exercised—Death of donee—Not exercisable by any other person unless will clearly so indicates.*

An option to purchase given by a will is exercisable only by the donee, to whom it is prima facie personal. Accordingly, should the donee die without having exercised it, no other person can exercise it unless the will clearly so indicates.

*In re Cousins* (1885) 30 Ch. D. 203 followed. Statement in Jarman on Wills, 7th ed., p. 73, considered and approved.

ADJOURNED SUMMONS.

This summons raised the question whether an option to purchase given by a will was exercisable by the donee only or, after his death without having exercised it, by assignees of it during his life or by his personal representatives.

By his will dated February 15, 1911, William Shaw Sykes (hereinafter called "the testator") gave his estate to his executors on trust to sell and convert, to invest the residue in their names (after paying debts and funeral and testamentary expenses), to pay the income of the investments to his wife for life and after her death to stand possessed of the proceeds, moneys and trust premises in trust for his sons Edward Musgrave Sykes and Leonard Musgrave Sykes in equal shares and, should either of them predecease the testator's wife without leaving issue, his share of the testator's estate was to pass to the survivor of the testator's sons absolutely: should either of them predecease her leaving issue who should survive her and attain twenty-one years of age, his surviving child or children, on attaining that age, was or were to enter into possession of his share, if more than one in equal shares. Neither of these events happened.

The will also provided: "Whereas part of my estate "consists of the shares in the English Card Clothing Company, "Limited, now standing in the name of my son Edward

"Musgrave Sykes as registered owner, and I am desirous "that my said son shall have the opportunity of becoming "absolute owner of the same shares, now I hereby declare "and direct that upon the decease of my said wife or previously "thereto in case or whenever my trustees shall proceed to "realise the part of my estate consisting of or including such "shares and my beneficial right thereto and ownership thereof, "my son Edward Musgrave Sykes shall have the option of "purchasing and becoming absolute owner of the said shares "or any part thereof, and all my estate interest right and "title therein and thereto, the value of such shares for the "above purpose to be estimated at par value."

The testator died on September 9, 1916, at which date Edward Musgrave Sykes (hereinafter called " the son ") was the registered holder of 300 shares of 10*l.* each in the company. Article 42 of its articles provided : " No transfer of a share "or shares shall be made without the same being first offered "to the directors at the market price to be ascertained in "accordance with article 43. Should the directors within 30 "days of the same being offered to them accept the share or "shares on behalf of one or more of their number or his or "their nominee or nominees, the share or shares shall be "transferred accordingly. If the directors do not accept or "decline the offer within 30 days the shareholder shall be at "liberty to deal with the share or shares as he may think fit, "subject to article 42." Article 43 contained provisions to enable the market price of the shares to be ascertained.

After the testator's death those 300 shares of 10*l.* each were converted into 3000 ordinary shares of 1*l.* each, and subsequently, as the result of a capitalization of profits, 1500 fully paid ordinary shares were issued to the son in respect of his holding of 3000 ordinary shares.

By a deed dated July 26, 1932, the son assigned the benefit of the option to trustees. On May 18, 1939, the testator's widow died : and on June 29, 1939, the son died, without having exercised the option. On November 29, 1939, his executors purported, by notice in writing, to exercise it : and on February 14, 1940, the trustees of the deed of July 26, 1932, on the footing that they were assignees of the option, purported also to exercise it by a notice in writing.

By this summons, taken out on March 5, 1940, Mr. Arnold Chadwick Younghouse (hereinafter called "the plaintiff"), one of the trustees of the testator's will, asked (inter alia) whether, on the true construction of the will, the option ceased to be exercisable on the son's death, or was validly exercised by the notice of November 29, 1939, or, alternatively, by that of February 14, 1940.

The defendants to the summons were Mr. Leonard Musgrave Sykes, who was the other trustee of the testator's will: Mr. Alan John Skelton and Mr. Joe William Dyson, the the son's executors, Mr. Skelton being also a trustee of the deed of 1932; and Mr. Norman Hugh Mathews, the other trustee of the deed of 1932.

*E. M. Winterbotham* for the plaintiff.

*Roger S. Turnbull* for the other trustee of the will. On the true construction of the will, the option, on the son's death, ceased to be exercisable: see Jarman on Wills, 7th ed., vol. i., p. 73, where it is stated that "An option of purchase "given by will to A.B. is prima facie personal to him, and "does not pass to his executors on his death, but the will "may be so expressed as to confer a transmissible interest"; and *In re Cousins* (1) and *Belshaw* v. *Rollins* (2) are cited. That is a general principle, and is applicable here: but the question very largely depends on the construction of the will in each case.

If the suggestion that this is not a purely personal option be correct, it follows that, had the son predeceased the testator's widow, his executors could have obtained a very large beneficial share of the estate by exercising the option, even though he himself had been deprived of all interest in the residuary estate.

*T. A. C. Burgess* for the son's executors. On the authorities as they stand, there is no general principle. [He referred to *Buckland* v. *Papillon* (3) and to the judgment of Lord Lindley

(1) (1885) 30 Ch. D. 203.
(2) [1904] 1 Ir. R. 284.
(3) (1866) L. R. 2 Ch. 67.

in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900). (1)] On the authorities as they stand, an option given in this form is to be exercised within a reasonable time after the donee's death. *In re Cousins* (2) lays down no general principle whatever.

*Lloyd Williams* (*Lindsay M. Jopling* with him) for the other trustee of the deed of 1932. The circumstances in the present case are different from those in *In re Cousins*. (2) There the testator was dealing with a hotel: and in the case of a hotel goodwill is a matter of great importance.

BENNETT J. [after stating the facts:] The question which I have to decide is whether upon the true construction of the will the option ceased to be exercisable on the son's death. In my judgment it did, and I so decide upon what I conceive to be the authority of the Court of Appeal's decision in *In re Cousins*. (2) In Jarman on Wills, 7th ed., vol. i., at p. 73, occurs this passage: "An option of purchase given "by will to A.B. is prima facie personal to him, and does not "pass to his executors on his death," and in support of that proposition *In re Cousins* (2) is cited. The learned authors go on to state that the will may be so expressed as to confer a transmissible interest, and in support of that proposition an Irish authority, *Belshaw* v. *Rollins* (3), is cited.

It is contended on behalf of the son's executors and also on behalf of the trustees of the deed of July 26, 1932, that *In re Cousins* (2) is no authority upon any question of principle: that the question turns entirely upon the construction of the will of the testator whose testamentary dispositions were under consideration in the Court of Appeal. At one time I inclined to that view, but I think that when one looks carefully at the language used by Cotton L.J. and by Lindley L.J. in their judgments in that case, their language does support the proposition stated in Jarman on Wills, 7th ed., vol. i., at p. 73, and does establish this, that, prima facie, an option to purchase given by will to a named person

(1) [1903] A. C. 414, 423.
(2) 30 Ch. D. 203.
(3) [1904] 1 Ir. R. 284.

is personal to him and does not pass to his executors or confer a transmissible interest. Sir William Baliol Brett M.R. and Cotton and Lindley L.JJ. distinguished the case of a will from the case of an option granted by a contract, and I think that the decision was rested by Cotton L.J. and by Lindley L.J. on the ground that, prima facie, an option given by will is personal, and that, if the contrary is to be held, there must be found in the will giving the option some indication that it is exercisable by the executors of the person to whom it is given.

Now in this will there is, in my judgment, nothing which can form the foundation for an argument that the testator has shown an intention that the option which he gave to his son was to be exercisable by anyone other than the son. On the contrary, I think, for the reasons advanced by Mr. Turnbull upon the dispositions made by the testator of his estate, that it looks as if the testator was contemplating and intending that the option should be exercisable by the son only. I am deciding the case, however, not on that ground, but on the ground that, in my view, the decision in *In re Cousins* (1) does support the proposition stated by the learned authors of Jarman, and that in this will I can find no language to indicate that the option given by the testator to his son is to be exercised by any other person except the son: and I can so answer the first question raised by the summons.

The costs of all parties as between solicitor and client must be paid out of the testator's estate.

Solicitors: *Skelton & Co., Manchester; S. F. Miller, Mathews & Co., for Taylor, Kirkman & Mainprice, Manchester.*

(1) 30 Ch. D. 203.

K. R. A. H.

## *In re* GILT EDGE SAFETY GLASS, LIMITED.

CROSSMAN J.

1940
March 5, 6.

[009 of 1940.]

*Company—Directors—Qualification shares—Reduction of capital—Directors' holding reduced below minimum qualification value—Directors inadvertently continue to act—Summary proceedings for penalties—Petition to High Court for relief—Notification of proceedings to Board of Trade—Practice—Jurisdiction—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 141, 372, *sub-ss.* 1, 2.

Petitions were presented under s. 372 of the Companies Act, 1929, by two directors of a company, who had inadvertently continued to act as directors after they had, owing to a reduction of capital, ceased to hold qualifying shares of the minimum value required by the articles of association of the company.

Summary proceedings had been commenced against them under s. 141, sub-s. 1, of the Companies Act, 1929, for unlawfully acting as directors :—

*Held,* that s. 372, sub-s. 1, made the court which heard the case the only court which had jurisdiction to give relief in respect of the proceedings which had already been commenced.

*Held,* also, that with regard to the claim under s. 372, sub-s. 2, the Court would make an order granting the petitioners relief from future or apprehended claims, in respect of what was a purely technical defect; the summary proceedings already commenced being expressly excepted from that order.

*In re Barry and Staines Linoleum, Ld.* [1934] 1 Ch. 227 considered.

PETITIONS.

Two directors of a company, which was incorporated on October 15, 1929, under the Companies Acts, 1908 to 1917, under the name of Gilt Edge Safety Glass Syndicate, Ld. (which was in 1935 changed to its present name, "Gilt Edge "Safety Glass, Ld."), each held qualification shares of the aggregate nominal value of 10*l.*

By the company's articles of association it was provided:

"13. The qualification of a director shall be the holding of "shares of the company of the aggregate nominal value of at "least 10*l.* and it shall be his duty to comply with the "provisions of section 73 of the Companies (Consolidation) "Act, 1908. . . . ."

"14. The office of a director shall be vacated: . . . . If "he ceases to be a director by virtue of the Companies "(Consolidation) Act, 1908, section 73."

Sect. 73 of the Act of 1908 was re-enacted by s. 141 of the Companies Act, 1929.

In February, 1936, the issued shares in the company's capital were transferred to a company named Lancegaye Safety Glass (1934), Ld. (hereinafter called "Lancegaye"), which was incorporated on March 23, 1934, under the Companies Act, 1929. The issued share capital of the company which was transferred to Lancegaye, consisted of 21,294 issued ordinary shares of 1*l.* each and 17,000 issued founders shares of 1*s.* each. At that time the two directors of the company were directors of "Lancegaye."

On February 26, 1937, the capital of the company was by special resolutions of the company reduced to 7,381*l.* divided into 21,294 ordinary shares of 6*s.* 8*d.* each and 17,000 founders shares of 4*d.* each. The reduction was confirmed by an order of the Court on April 12, 1937.

On June 29, 1939, owing to the acquisition by a company named Triplex Safety Glass, Ld., of practically all the shareholding in the company, the two directors resigned from the board of the company. They were unaware, until October, 1939, that, when the reduction of the capital of the company was effected, the fact had been overlooked that their qualification shares had been reduced to shares of a nominal value of 3*l.* 6*s.* 8*d.* Consequently they had, from the date of the reduction, continued until June 29, 1939, to act as directors and to receive remuneration, although not qualified to do so.

On or about October 6, 1939, they were served with summonses to appear before the court of summary jurisdiction at Bow Street on October 16, 1939, to answer informations that they did on June 29, 1939, unlawfully act as directors of the company after the expiration of two months from the date of their appointments, contrary to s. 141 of the Companies

Act, 1929 (1), under which section they became liable to a fine.

The Metropolitan magistrate adjourned the hearing of the summonses to enable the two directors to apply to the High Court of Justice for relief.

They therefore presented petitions under s. 372 of the Companies Act, 1929, in which they sought the following relief :—

(1.) That your petitioner may be relieved by this Honourable Court pursuant to s. 372 of the Companies Act, 1929, from any liabilities for fines and penalties which he may have incurred under s. 141 of the said Act or otherwise by reason of his negligence, default, breach of duty or breach of trust in having acted, without being qualified and while disqualified as a director of the company.

(2.) That your petitioner may also be relieved by this Honourable Court pursuant to the said section from any liability which he may be under to the company in respect of his negligence, default, breach of duty or breach of trust in drawing or receiving remuneration or otherwise acting as a director of the company without being qualified and while disqualified to act as such. (2)

(1) Sect. 141, sub-s. 5 : "If after "the expiration of" [the specified period of two months after the date of the appointment, or such shorter time as shall be fixed by the articles] "any unqualified "person acts as a director of the "company, he shall be liable to a "fine not exceeding five pounds "for every day between the "expiration of the said period or "shorter time or the day on which "he ceased to be qualified, as the "case may be, and the last day "on which it is proved that he "acted as a director."

(2) By s. 372 of the Companies Act, 1929, it is provided : "(1.) If in "any proceeding for negligence, "default, breach of duty, or breach "of trust against a person to "whom this section applies it "appears to the court hearing the "case that that person is or may "be liable in respect of the negligence, default, breach of duty "or breach of trust, but that he "has acted honestly and reasonably, and that, having regard to "all the circumstances of the case, "including those connected with "his appointment, he ought fairly "to be excused for the negligence, "default, breach of duty or breach "of trust, that court may relieve "him, either wholly or partly, "from his liability on such terms "as the court may think fit.

"(2.) Where any person to "whom this section applies has "reason to apprehend that any "claim will or might be made

*Hon. Charles Romer K.C.* and *Valentine Holmes* for the petitioners. This breach was of a secondary character arising under a scheme of reconstruction in the hands of the company's solicitor. A form of order granting relief under s. 372, sub-s. 2, of the Companies Act, 1929, will be found in Stiebels Company Law and Precedents, at p. 1278. The applicants acted innocently and in the belief that they were fully qualified.

*G. D. Roberts K.C.* and *Maurice Berkeley* for the company. The petitioners have been guilty of negligence, default and breach of duty. It is not suggested that they have acted dishonestly. This Court has no jurisdiction to grant relief in respect of the police court proceedings.

[They referred to *In re Barry and Staines Linoleum, Ld.* (1)]

*A. Andrewes Uthwatt* for the Board of Trade. As prosecutions under s. 141 of the Act are generally conducted by the Board of Trade, it is desirable that the Board of Trade should, as in the present case, be notified of proceedings under s. 372.

*Hon. Charles Romer K.C.* in reply.

CROSSMAN J. These are two petitions which have been heard together, each petition being by a director of a company called Gilt Edge Safety Glass, Ld., asking for relief under s. 372 of the Companies Act, 1929, from liability by reason of certain events which have happened and for which they may be held liable. The actual prayer in the two petitions is in this form: [His Lordship read the prayer in the petitions.]

This company, Gilt Edge Safety Glass, Ld., was incorporated in the year 1929 under the name "Gilt Edge Safety Glass "Syndicate, Ld." In 1931 its capital was increased to an amount which has now been reduced, and in 1935 it adopted

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"against him in respect of any "negligence, default, breach of "duty or breach of trust, he may "apply to the court for relief, and "the court on any such applica-"tion shall have the same power to "relieve him as under this section "it would have had if it had been "a court before which proceedings "against that person for negli-"gence, default, breach of duty or "breach of trust had been "brought."

(1) [1934] 1 Ch. 227.

its present name of Gilt Edge Safety Glass, Ld. At the beginning of the year 1936, a company known as Lancegaye Safety Glass (1934), Ld., acquired the whole of the issued share capital of this company, that is to say, 21,294 ordinary shares of 1*l.* each and 17,000 founders shares of 1*s.* each. On February 26, 1936, those shares were transferred to Lancegaye Safety Glass (1934), Ld., which company I shall refer to as "Lancegaye." On May 18, 1936, the two petitioners, Mr. Maurice Gordon Liverman and Mr. Charles Walter Latham, who were directors of Lancegaye, were elected directors of Gilt Edge Safety Glass, Ld., which I shall refer to as "Gilt Edge." Pursuant to the requirements of the articles of "Gilt Edge" ten ordinary shares of 1*l.* each were transferred by "Lancegaye" to each of the petitioners as directors' qualification. On February 18, 1937, the petitioner, Charles Walter Latham, was appointed managing director of "Gilt Edge" at a salary of 500*l.* per annum, he being already entitled under the articles of "Gilt Edge" to a salary as director, to which Mr. Liverman was also entitled. On April 12, 1937, an order was made confirming the reduction of the capital of "Gilt Edge" from 22,850*l.* to 7381*l.* 6*s.* 8*d.*, a very drastic reduction. That order and the minute approved by the Court were subsequently registered under s. 58 of the Companies Act, 1929.

The result of the registration of that order and the minute was that the petitioners' ten shares of 1*l.* each became 200 shares of 4*d.* each and instead of being of the nominal value of 10*l.* they became of the nominal value of 3*l.* 6*s.* 8*d.* The articles of "Gilt Edge" require shares of the nominal value of 10*l.* to be held by each director as director's qualification.

That being the case, as from the registration of the order confirming the reduction and the minute, "Gilt Edge" was left without any director at all, because all the directors were in the same position, each holding only shares of the nominal value of 3*l.* 6*s.* 8*d.* Then in June, 1939, a company called Triplex Safety Glass, Ld., acquired practically all the shares in "Lancegaye."

On June 29, 1939, the petitioners purported to resign their directorships—as a matter of fact, they had not any directorships to resign—and as from that date they ceased to act as directors. While they were acting as directors the first petitioner, Mr. Liverman, had received the sum of 116*l.* 15*s.* 2*d.* as director's fees, and the other petitioner, Mr. Latham, had received the sum of 1497*l.* 13*s.* 2*d.*, partly as ordinary director's fees and partly as salary as managing director. On October 6, 1939, a summons was issued based on an information sworn by the secretary of "Gilt Edge," the information alleging that the petitioners acted as directors of "Gilt Edge" on June 29, 1939, after the expiration of two months from the date of their appointment, contrary to s. 141, sub-s. 5, of the Companies Act, 1929. That information came before the magistrate at the Bow Street Police Court on October 16, 1939, and was adjourned sine die. On October 18, two days after the adjournment of the summons, a claim was made by the solicitors of "Gilt Edge" against the petitioners for repayment by the petitioners of the fees received by them as directors from the date when the reduction of the capital of "Gilt "Edge" took effect, that is to say, from the date of the registration of the order confirming the reduction and the minute. On December 13, 1939, the summons at Bow Street Police Court was restored for January 8, 1940, and on January 4, 1940, the petitioners presented these petitions, praying for that relief which I have already read. On January 8, 1940, the summonses at Bow Street were again adjourned pending the hearing of these petitions.

Article 13 of "Gilt Edge" provides: "The qualification of "a director shall be the holding of shares of the company of "the aggregate nominal value of at least 10*l.*, and it shall be "his duty to comply with the provisions of Section 73 of the "Companies (Consolidation) Act, 1908. A director may act "before acquiring his qualification." Sect. 73 of the Companies (Consolidation) Act 1908, is the section which is now represented by s. 141 of the Companies Act, 1929. Article 14 provides for the disqualification of directors: "The office of "a director shall be vacated, . . . . (2.) If he ceases to "be a director by virtue of the Companies (Consolidation)

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"Act, 1908, Section 73." That is all that I need read of the articles.

The position was that on the reduction of the capital of "Gilt Edge" taking effect the petitioners had vacated their office; they ceased to be directors. Then sub-s. 5 of s. 141 of the Act of 1929 provides: [His Lordship read sub-s. 5 and continued:] I have been referred to s. 11 of the Summary Jurisdiction Act, 1848, the effect of which is that the petitioners cannot be proceeded against more than six months from the time at which the offence occurred and, therefore, as the last offence occurred on June 29, 1939, no further proceedings under s. 141, sub-s. 5, of the Act of 1929, can be taken against the petitioners.

S. 372 of the Act, which is the section under which I am asked by the petitioners to exercise jurisdiction, is to this effect: [His Lordship read sub-ss. 1 and 2 and continued:] Sub-sect. 4 (*a*) provides: "The persons to whom this section "applies are . . . . (*a*) directors of a company," so that the petitioners, who come within that sub-section are persons to whom the section applies. I think that it follows from the decision of Maugham J. in *In re Barry and Staines Linoleum, Ld.* (1), that the phrase "any claim . . . . in "respect of any negligence, default, breach of duty or "breach of trust" in s. 372, sub-s. 2, of the Act of 1929, includes proceedings against the petitioners under s. 141, sub-s. 5, and so includes the proceedings against the petitioners which were commenced last October at Bow Street Police Court, as in that case the learned judge gave relief under s. 372, sub-s. 2, from prospective liability to fines and penalties under s. 141, sub-s. 5.

But it seems to me that s. 372, sub-s. 1, makes the court which hears the case the only court which has jurisdiction to give relief in respect of proceedings which have already been commenced. Sub-s. 2, on the other hand, which is the sub-section which was added by this Act, was in my judgment intended to meet the case of proceedings which have not been commenced, but which will or may be commenced, and gives

(1) [1934] 1 Ch. 227.

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this Court jurisdiction to grant relief from prospective liability.

Sub-s. 1 does not, in my opinion, enable me to deal in any way with what the magistrate has done or is doing in the proceedings at Bow Street, and those proceedings will be unaffected by any order which I make here. "The court "hearing the case" in sub-s. 1 means, in my judgment, the court hearing the particular case in which the proceedings are taken, and I think that it is for the magistrate at Bow Street to deal with the summons which is pending there for fines and penalties alleged to have been incurred by these petitioners in respect of their negligence, default, breach of duty or breach of trust. It is true that para. 1 of the prayer is not expressly limited to the Bow Street proceedings; but, having regard to the fact that no other proceedings under s. 141 of the Act of 1929 have been commenced, those are by reason of s. 11 of the Summary Jurisdiction Act, 1848, the only proceedings for fines and penalties which can now be taken and therefore I cannot make any order on para. 1 of the prayer.

Para. 2 of the prayer is an entirely different matter: [His Lordship read para. 2 and continued:] The question that I have to decide is whether I ought to make an order under that sub-section relieving the petitioners from any apprehended liability. It has been suggested here that the last paragraph of Maugham J.'s judgment in the case to which I have referred, shows that I ought not to make any order where the company is unwilling that an order should be made. I think that neither Mr. Roberts nor Mr. Berkeley, who appear for "Gilt "Edge," now contend that that suggestion is justified. It seems to me that what Maugham J. is referring to in the last paragraph of his judgment is the importance of the Court having information as to the views of the persons concerned before it comes to a decision as to giving relief under sub-s. 2. It does not follow, I think, that, because the shareholders oppose the application, therefore the Court ought not to exercise its jurisdiction. The opinion of the shareholders is only one of the circumstances which the Court has to take into account. What I have to consider in this case, having satisfied myself as to the first two conditions of the exercise of the jurisdiction—that is to say, honesty and reasonableness—and I think it is substantially admitted by counsel for "Gilt Edge" that in this case the petitioners acted honestly and reasonably—is whether, having regard to all the circumstances of the case, including those connected with their appointment, the petitioners ought fairly to be excused for whatever the particular default is, negligence, default, breach of duty or breach of trust. Here it is admitted, I think, and I do not think there is any question on the evidence as to this, that the petitioners had no idea that they had ceased to be directors of "Gilt Edge" owing to the reduction of the capital. The solicitor who acted in the matter of the reduction had not realized it; he has given evidence before me and it is quite clear that he had not realized it, and I do not think that even an expert lawyer could fairly be blamed for not having observed that particular result of the reduction. It was a pure accident, I think, that the petitioners became disqualified as directors on the reduction taking place. They never thought about it, and the question is whether their not having thought about it amounts to such negligence or default or breach of trust as to prevent their obtaining relief under s. 372. I think that in a sense it may be that they were negligent, and no doubt, without knowing it, they committed a breach of duty in continuing to act as directors when they were no longer qualified. But this was a purely technical defect which would, if it had been realized, have been put right at once, because they were merely representatives of "Lancegaye" which held the shares in "Gilt Edge," and could have transferred sufficient of the 4*d.* shares to meet the qualification; and I have no doubt that "Lancegaye" would have done so if it had realized the position. Having regard to that fact and to the fact that their not holding shares of the nominal value of 10*l.*, caused "Gilt Edge" no loss and really made no difference whatever to "Gilt Edge," I find it difficult to see how I can come to the conclusion that the petitioners ought not fairly to be excused for what was a purely technical wrongdoing. It has been suggested that the petitioners in some way or other neglected their duty as directors of "Gilt Edge," and that they got more money than they ought to have got. These suggestions, which came out in the cross-examination of one of the witnesses, seem to me to be wholly irrelevant here, even if I accepted them as facts. The fact, if it be the fact, that the Triplex Company has some grievance against the petitioners does not seem to me to justify me in finding that they ought not fairly to be excused for their negligence or default or breach in the circumstances of the case or in refusing to exercise the discretion, which I have under the section, to relieve them from liability for their conduct.

The result is that I think that this is a case in which I ought to exercise my jurisdiction under s. 372, sub-s. 2, to relieve the petitioners from prospective liability in respect of their conduct. I propose to make an order under para. 2 of the prayer in each petition.

There will be no order under para. 1.

The applicants must pay the costs of "Gilt Edge" and of the Board of Trade.

Counsel will be good enough, with the assistance of the registrar, to prepare minutes of the order and, if any question arises, the matter may be referred to me again.

The order as drawn up (after reciting "it appearing that "proceedings are pending before a court of summary jurisdiction in relation to the matter raised by para. 1 of "the prayer of the said petition") was as follows :—

> This Court doth not think fit to make any order in answer to paragraph 1 of the Prayer in the said petition And this Court being of opinion that the petitioner the said Charles Walter Latham is or may be liable for negligence default breach of duty or breach of trust in respect of the matters hereinafter mentioned and that the petitioner has acted honestly and reasonably and that in all the circumstances of the case as set out in the said petition and proved by the said affidavits of the said petitioner the said petitioner ought fairly to be excused from such liability as aforesaid.
>
> This Court doth order that the petitioner be and he is hereby relieved pursuant to section 372 of the Companies Act 1929 from all liability to the above named company in respect of his negligence default breach of duty or breach of trust in that he not being qualified as a director and being disqualified from acting as such drew remuneration

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as a director chairman and managing director of the said company and in that he was a party to payment of remuneration to other directors who were respectively not qualified to act as directors of the company and that such relief should extend to all other acts committed by him as a director whilst so disqualified as aforesaid but so that nothing herein contained shall relieve the petitioner in respect of any order which may be obtained in the proceedings referred to in paragraph 15 of the said petition or from any liability which he may have incurred for acts done as a director chairman and managing director for which he would have been liable if he had been fully qualified other than being party to such payment of remuneration as aforesaid.

And it is ordered that the petitioner the said Charles Walter Latham do pay to the said Gilt Edge Safety Glass Limited and to the Board of Trade their costs of the said petition such costs to be taxed.

Solicitors: *Linklaters & Paines; Last, Riches & Fitton; Solicitor to the Board of Trade.*

J. L. D.

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April 8.

# *In re* GAUMONT-BRITISH PICTURE CORPORATION, LIMITED.

*Company—Inspection—Investigation of affairs of company by Board o Trade inspector—Officer of company required to give evidence—Refusal to answer questions in presence of third party—Shorthand writer—Inspector's right to introduce an assistant—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 135.

An inspector appointed by the Board of Trade under s. 135 of the Companies Act, 1929, to investigate the affairs of a company is entitled to the assistance of any person whom he may reasonably require to be present at the investigation to enable him to prepare his report. An officer or agent of the company summoned to such an investigation is not entitled to refuse to answer questions put to him by the inspector on the ground that he, the inspector, has brought in a shorthand writer to take a note of the evidence, and if he so refuses, he is in the same position as a person who has committed a contempt of Court.

*Hearts of Oak Assurance Co.* v. *Attorney-General* [1932] A. C. 392 applied.

MOTION.

In January, 1939, on the application of the prescribed number of shareholders, the Board of Trade appointed Russell Kettle as an inspector under s. 135 of the Companies Act, 1929, to investigate the affairs of the Gaumont-British Picture Corporation, Ld.

Under s. 135, it is the duty of officers and agents of the company on such an inspection to produce any books and documents relating to the company which the inspector may require, and to answer any questions which the inspector may put to them upon oath. If an officer or agent refuses to give evidence or answer questions at the inquiry, the inspector is to report the matter to the Court, and the person so refusing to answer is to be treated as being in the same position as one who has committed a contempt of Court.

At the inquiry held at the offices of the company the inspector put certain questions as to the affairs of the company to Mark Ostrer, the managing director. Mark Ostrer refused to answer any questions on the ground that there was a third party, namely, a shorthand writer instructed by the inspector, present. The inspector reported the matter to the Court, and the

Attorney-General now moved that the Court should inquire into the case and punish the offender.

*Sir Donald Somervell A.-G.* and *A. Andrewes Uthwatt* for the Board of Trade inspector.

There was no justification for Mr. Ostrer's refusal to give evidence in the presence of a shorthand writer. The inspector must himself decide exactly how the investigation is to be conducted by him. A transcript of the evidence is necessary to enable the inspector to prepare his report, and the report is the only document which he sends to the Board of Trade.

In *Hearts of Oak Assurance Co.* v. *Attorney-General* (1) the question was whether an investigation by an inspector of the Board of Trade into the affairs of an industrial assurance company under the Industrial Assurance Act, 1923, should be conducted in public or in private. The House held that it must be heard in private, but that there was nothing to prevent the inspector from admitting any persons whose assistance he might require, and that the case was analogous to an inquiry under s. 135 of the Companies Act, 1929. The same principles apply in the present case, and as a shorthand writer was reasonably necessary to the inspector to take a note of the evidence on which the report was to be based, he was entitled to admit him, and instruct him to take a note of the evidence.

*Charles Harman K.C.* and *H. C. Marks* for the respondent. Mr. Ostrer was justified in his attitude of refusing to give evidence as to the affairs of the company before a third person. The shareholders who applied for the investigation were largely influenced and backed by the chairman of the Gaumont Company's principal competitor in business. Mr. Ostrer had no doubt that information sought to be elicited from him would be very valuable to a competing company, and it would be dangerous to the Gaumont Company if it should be revealed by the presence of a third party.

In a case heard in public any shorthand writer can come in and take a note of the evidence, but he has no right to do so in a case heard in camera. In an infant's case heard in Chambers

(1) [1932] A. C. 392.

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no shorthand writer is ever present, unless all parties agree to bring him in. In such a case as the present the evidence is often scheduled to the report. Under the Winding-up Rules there is power to bring in a shorthand writer to take a note of proceedings in the investigation of the affairs of a company in liquidation under s. 214, but there is no corresponding power in cases under s. 135. The inspector is not an officer of the Court but of the Board of Trade: *In re Grosvenor and West-End Railway Terminus Hotel Co., Ld.* (1); *In re Sir John Moore Mining Co.* (2); *In re Hilleary and Taylor.* (3)

*Sir Donald Somervell A.-G.* replied.

CROSSMAN J. This is a motion by Mr. Russell Kettle, the person appointed by the Board of Trade as inspector to investigate the affairs of Gaumont-British Picture Corporation, Ld., pursuant to s. 135 of the Companies Act, 1929, asking "That "the Court may inquire into the refusal of the respondent "Mark Ostrer, an officer of the company, to answer any "questions put to him by the applicant as such inspector and "otherwise may inquire into the case and that such order may "be made with reference thereto as to this honourable Court "shall seem meet and that the respondent Mark Ostrer may be "ordered to pay the costs of this application."

The section under which these proceedings are taking place is s. 135, sub-s. 1, which provides: "The Board of Trade may "appoint one or more competent inspectors to investigate the "affairs of a company and to report thereon in such manner as "the Board direct." Then there is provision what proportion of the shareholders of the company must apply to the Board of Trade for the investigation. Sub-s. 3 states: "It shall be "the duty of all officers and agents of the company to produce "to the inspectors all books and documents in their custody "or power." By sub-s. 4: "An inspector may examine on "oath the officers and agents of the company in relation to "its business, and may administer an oath accordingly." Sub-s. 5 provides: "If any officer or agent of the company

(1) (1897) 76 L. T. 337.

(2) [1878] W. N. 87.

(3) (1887) 36 Ch. D. 262.

"refuses to produce to the inspectors any book or document "which it is his duty under this section so to produce, or "refuses to answer any question which is put to him by the "inspectors with respect to the affairs of the company, the "inspectors may certify the refusal under their hand to the "court, and the court may thereupon inquire into the case, "and after hearing any witnesses who may be produced "against or on behalf of the alleged offender and after hearing "any statement which may be offered in defence, punish the "offender in like manner as if he had been guilty of contempt "of the court." By sub-s. 6: "On the conclusion of the "investigation the inspectors shall report their opinion to the "Board of Trade, and a copy of the report shall be forwarded "by the Board to the registered office of the company, and a "further copy shall, at the request of the applicants for the "investigation, be delivered to them. The report shall be "written or printed, as the Board direct."

The inspector was appointed by the Board of Trade on an application by the necessary proportion of the shareholders of the company on July 31, 1939. He summoned Mr. Mark Ostrer, the respondent to the present motion, before him for examination on January 10, 1940, and the respondent attended on that day. What occurred then was stated in the inspector's report which is dated February 5, 1940, and is as follows: "I, Russell Kettle, of 5, London Wall Buildings, Finsbury "Circus, in the City of London, chartered accountant, being "the inspector appointed by order of the Board of Trade "dated January 31, 1939, to investigate the affairs of the "above-named company and to report thereon in such manner "as the board may direct, hereby certify to this Court as "follows: (1.) As such inspector I arranged pursuant to s. 135 "of the Companies Act, 1929, for the examination on "January 10, 1940, at the company's offices of Mr. Mark "Ostrer, of 142-150, Wardour Street, London, W.1, the "managing director of the company. (2.) On that day Mr. "Mark Ostrer accompanied by Mr. W. B. Robinson, the "secretary of the company (who had been summoned for "examination under the same section), attended at the "company's offices for examination. In accordance with "arrangements made by me a representative of Messrs. Cherer "and Company, shorthand writers, was present with the object "of taking for my use a shorthand note of the proceedings and "of supplying me with a transcript thereof.

"(3.) Mr. Mark Ostrer objected to the presence of a shorthand "writer and said that neither he nor Mr. Robinson was prepared "to be examined if anyone was in the room besides myself. "He gave two reasons for his objection: first, that under "s. 135 there was no authority for the presence of a shorthand "writer; and, secondly, that, as the examination would "involve the disclosure of private information concerning the "company's private affairs, he was not prepared for the "information to be divulged to a third party. I asked Mr. "Ostrer how he suggested the proceedings should be recorded "and he said that I would have to write them out in long-"hand. I told him that in my opinion his attitude was un-"reasonable in that such a course was impracticable in view of "the extent and nature of my proposed examination and not "in accord with ordinary business procedure. I added that "even assuming I myself made the notes they would subse-"quently be typed in my own office. He refused, however, to "proceed with the examination if I insisted that a shorthand "writer should be present. I told him he left me no alternative "but to withdraw and report the matter to the Court. (4.) It "was also my intention, as I explained to Mr. Mark Ostrer, for "my representative in charge of the investigation to be present "solely for the purpose of facilitating my reference to papers "and thus expedite the examination, and I told him that my "representative would, in any event, become acquainted with "the proceedings. Mr. Ostrer, however, said he could not agree "and I did not press for my representative's attendance."

That is the report, and as I understand the effect of the evidence which has been filed on this application—there is an affidavit of Mr. Russell Kettle, the applicant, and also an affidavit of Mr. Mark Ostrer—that report is accepted as an accurate statement of the facts. I do not think that what Mr. Mark Ostrer says in any way contradicts the statements in the report; all he does is to point out his view of what would be the result of having a shorthand note taken. I think that I must accept it as a fact that Mr. Mark Ostrer refused to answer a question as long as any person other than the applicant, Mr. Russell Kettle, was in the room. The question is whether he was justified in doing that. Mr. Harman, who appears for Mr. Mark Ostrer, contends that Mr. Kettle had no right to have a shorthand writer in the room during the examination held under s. 135. I am unable to accept that contention. It seems to me plain, in view of the decision to which I will refer in a moment, that Mr. Kettle is entitled to have in the room any person whose presence is reasonably necessary to enable him properly to carry out his duty under the section. If it be the fact that the presence of a shorthand writer to take a note of the proceedings as a record for Mr. Kettle's own use in preparing his report is reasonably necessary to enable Mr. Kettle properly to carry out his duty under the section, then it seems to me that there is no question but that Mr. Kettle is entitled to have the shorthand writer present.

In this case I have the advantage of the decision of the House of Lords in *Hearts of Oak Assurance Co.* v. *Attorney-General* (1) to assist me. That was a decision under a different Act of Parliament, but fortunately for me the House of Lords dealt with the case by reference to this very s. 135 of the Companies Act, 1929. What was decided in that case was that an examination under the Friendly Societies Act, 1896, and the Industrial Assurance Act, 1923, is not a legal proceeding and ought to be held in private. Lord Thankerton said: "The nearest analogy to the present case"—that is, the *Hearts of Oak* case—"is to be found in s. 135 of the Companies "Act, 1929, under which the Board of Trade is entitled to "appoint inspectors to investigate the affairs of a company "and to report thereon; the provisions are very similar, "except that the Board of Trade can only so act on the applica-"tion of a prescribed number of shareholders, and that if the "board, on receipt of the report, are of opinion that an offence "has been committed they are to refer the matter to the

(1) [1932] A. C. 392, 398.

"criminal authorities. It has been held that an investigation "under the corresponding provisions of the Companies Act, "1862, is not a judicial proceeding: see *In re Grosvenor and* "*West-End Railway Terminus Hotel Co.* (1) The reasons "against publicity in such an investigation would be equally "strong in my opinion."

On that the House came to the conclusion that it was not right to hold an inquiry under the Industrial Assurance Act, 1923, in public, and that it ought to be held in private, but they accepted and made part of the judgment of the House the following declaration: "Declared that an inspector appointed "by the Industrial Assurance Commissioner under s. 17, sub-s. 1, "of the Industrial Assurance Act, 1923, for the purpose of "examining and reporting on the affairs of the plaintiffs is not "entitled to conduct the inspection in public, but this shall not "prevent him from admitting from time to time any persons "the presence of whom is reasonably necessary to enable him "properly to carry out his duty under the statute."

It seems to me that exactly the same thing applies here. What I have to consider is whether the presence of the shorthand writer is something which is reasonably necessary to enable the inspector properly to carry out his duty under the statute. I come to the conclusion that it is so necessary. The taking of a shorthand note is not for the purpose of publishing the proceedings, or doing anything of that kind. It is for the purpose of enabling the inspector to prepare his report. When he comes to prepare his report he wants a record of what has occurred and the shorthand note is for that purpose. The presence of a shorthand writer for that purpose is, in my view, reasonably necessary to enable the inspector properly to carry out his duty under the statute. In these circumstances it seems to me that there is no more to be said in the matter.

Mr. Ostrer refused to answer any questions because of the presence of the shorthand writer, who, in my view, was entitled to be present. Mr. Ostrer was, therefore, not justified in refusing to answer the questions, and he is in effect in the same position as if he had been guilty of contempt of Court, having regard to sub-s. 5 of s. 135. He has, however, in his evidence and by his counsel apologized for what amounts to a contempt of Court in the event of it being held that he is in fact wrong, and in these circumstances I do not think that I ought to take any step in the nature of punishment beyond ordering him to pay the costs of the proceedings, which I think I ought to do.

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(1) 76 L. T. 337.

Addressing the Attorney-General, his Lordship said: Whether there should be any declaration, Mr. Attorney, I am not satisfied.

*Sir Donald Somervell A.-G.* With great respect, your Lordship has no jurisdiction to make any declaration. Sub-s. 5 of s. 135 states: "If any officer or agent of the company refuses "to produce to the inspectors any book or document which it is "his duty under this section so to produce, or refuses to "answer any question which is put to him by the inspectors "with respect to the affairs of the company, the inspectors may "certify the refusal under their hand to the court, and the "court may thereupon inquire into the case, and after hearing "any witnesses who may be produced against or on behalf of "the alleged offender and after hearing any statement which "may be offered in defence, punish the offender in like manner "as if he had been guilty of contempt of the court." That is what the Court has jurisdiction to do. I was not asking for committal, I was asking for costs as between solicitor and client, a form which is sometimes adopted. I do not press that. It will show it was something done in lieu of committal, it not being suggested by me it was a proper case for committal. There is no suggestion that any right of appeal can be prejudiced by the fact that, instead of my asking for committal, the only step taken against the respondent is that he is ordered to pay the costs.

CROSSMAN J. I think that that is so. I shall not make any declaration. I shall order Mr. Ostrer to pay the costs of the application. The costs will be taxed as between party and party.

Solicitors: *The Solicitor, Board of Trade; Lawrance, Messer & Co.*

H. L. L.

SIMONDS J.
1940
March 19.

## *In re* ROYCE (DECEASED).

## TURNER *v.* WORMALD.

[1939. R. 1801.]

*Charity—Legacy to vicar and churchwardens of parish—For benefit of choir—Validity—Advancement of religion—General charitable intention—Surplus applicable cy-près.*

Under a will a legacy and a considerable share of residue were bequeathed to the vicar and churchwardens of a parish church, "for the benefit of the choir":—

*Held*, that the intention of the testator was to provide a fund for the maintenance and improvement of the musical services of the church and that it being one for the advancement of religion, there was a valid charitable bequest. There being a general charitable intention shown by the will, and the amount being greater than could be used for the choir, a scheme was directed for the application of the surplus cy-près.

SUMMONS.

The testator, David Needham Royce, by his will dated September 30, 1938, gave a large number of legacies to friends and relations and to charitable institutions. One legacy was of 1000*l.* to the vicar and churchwardens of Oakham parish church for the benefit of the choir. He devised and bequeathed his residuary real and personal estate upon trust for sale, and directed the net residue to be divided into five shares, one of such shares to go to the vicar and churchwardens of Oakham church for the same purposes as those declared concerning the legacy of 1000*l.* The testator died on December 26, 1938, leaving a large estate. He had been a member of Oakham church choir for sixty years. The services of the church comprised choral matins and evensong and choral eucharist on every Sunday.

The plaintiff as trustee of the will took out the summons to have determined the meaning and validity of the bequest.

*C. D. Myles* for the plaintiff.

*H. B. Vaisey K.C.* and *H. E. Salt* for the vicar and churchwardens of Oakham parish church. It might be possible to interpret the gift as one to the members of the choir at the date of the will, as individuals. But it is submitted that that is not the true meaning. It is intended for the support and improvement of the musical services in the church. It is one, therefore, for the advancement of religion, and a valid charitable bequest. The will shows a general charitable intention. A scheme should be settled for the administration of the fund, and any surplus not required for the choir should be applied cy-près.

*R. F. Roxburgh K.C.* and *R. W. Goff* for the defendant Mrs. Elizabeth Barker, one of the next of kin. The bequest is invalid. The choir, as such, is not recognized as part of the established institution in a parish church, as distinguished from a cathedral or a collegiate church. This was so stated in a case of *Attorney-General* v. *Oakaver*, which is not reported directly, but referred to in the argument before Lord Hardwicke in *Attorney-General* v. *Whorwood*. (1) The former case had come before Lord Hardwicke, and he had upheld a gift for the organ and the benefit of the organist in a parish church, but refused to uphold a similar gift for the choir. A choir is not a necessary part of a parish church: see *Hutchins* v. *Denziloe*. (2) Singing with plain congregational music, however, is fully authorized. There is only one reference to the choir of a parish church in Phillimore's Ecclesiastical Law (at p. 765). But assuming that a choir can be a proper object of a charitable bequest, the gift of a share of residue is a gift of more capital than is needed for the purpose. There is no general charitable intention shown, and any surplus should go to the next of kin.

*Humphrey H. King* for the defendant Francis J. Hill, a member of the choir and formerly choirmaster. A gift for the benefit of a choir may be personal or impersonal. The adult members of the choir feel difficulty in saying that this is a personal gift to them, and they wish the money to be applied in improving the musical services. But half the choir consists of boys, who cannot so give their rights away.

(1) (1750) 1 Ves. Sen. 534. Lord Redesdale C. in *Bond* v. *Hopkins* (1802) 1 Sch. & Lef. at p. 437 referred to *A.-G.* v. *Whorwood* as having been "imperfectly reported."

(2) (1792) 1 Hagg. Cons. Cas. 170.

*H. B. Vaisey K.C.* in reply. The report of *Attorney-General* v. *Oakaver* (1) is obscure, but it appears that Lord Hardwicke was dealing, not with the choir as such, but with the choristers individually. A choir has always been perfectly legal and usual in a parish church. This is recognized in *Hutchins* v. *Denziloe*. (2) There is no capitular body in a parish church, as there is in a cathedral, and this may have been in Lord Hardwicke's mind in *Attorney-General* v. *Oakaver*. (3) The choristers are not part of the corporate body: *In re Palatine Estate Charity*. (4) That was a charity for the benefit of St. Mary, Stoke Newington, from which the organist and choir benefited. In any case, whatever may have been the custom in 1736, at the present day a choir is a regular and necessary element in a parish church, and the contention that it is, or ever has been, illegal cannot be sustained.

[They also referred to *Turner* v. *Ogden* (5), the Book of Common Prayer and Hook's Church Dictionary.]

There is a general charitable intention shown by the will.

*A. Andrewes Uthwatt* for the Attorney-General. Apart from the legacy of 1000*l.*, the testator has given an undefined share of residue, the amount of which he probably did not know. He intended the income of the fund to be applied in improving the musical services of the church. It is not a gift to the trustees of the will, but out and out to the vicar and churchwardens, who have many other church duties apart from the choir and its musical service. The gift is one clearly for the advancement of religion and therefore a good charitable gift. A scheme should be directed.

[He referred to *In re Monk* (6), *In re King* (7), and *In re Robertson*. (8)]

SIMONDS J. In this case the testator, David Needham Royce, died on December 26, 1938, leaving a large fortune. He made his will on September 30, 1938, and the question which I have to determine arises on a pecuniary bequest and a bequest of a share in his residuary estate. The pecuniary bequest, which was one of a large number of legacies to friends and for various charitable purposes and to charitable institutes, was in these terms: "To the vicar and churchwardens of "Oakham Church for the benefit of the choir the sum of "1000*l*." By the residuary bequest he gave and devised his real and the residue of his personal estate to his trustees on trust for sale and directed them "to stand possessed of the "residue in trust as to two-fifths thereof for the before-"mentioned Royce Institute, Southgate, Leicester, absolutely. "As to a further one-fifth thereof for the vicar and church-"wardens of Oakham Church aforesaid for the purposes "declared concerning the legacy given to them as aforesaid" —that is, the legacy of 1000*l*. which I have just stated—"As "to a further one-fifth for the Leicester Royal Infirmary and "as to the remaining one-fifth for the Rutland Memorial "Hospital."

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(1) See note (1), ante p. 515.
(2) 1 Hagg. Cons. Cas. 170.
(3) 1 Ves. Sen. 534.
(4) (1888) 39 Ch. D. 54.
(5) (1787) 1 Cox Eq. Cas. 316.
(6) [1927] 2 Ch. 197.
(7) [1923] 1 Ch. 243.
(8) [1930] 2 Ch. 71.

I have to determine the meaning and validity of the gift: "To the vicar and churchwardens of Oakham Church for the "benefit of the choir," the first question being what the words "for the benefit of the choir" mean. They are, perhaps, susceptible of several meanings. "The choir" may mean a certain part of the fabric of the church. I only mention that in order to dismiss it. It is clear that this is not a gift for the benefit of any part of the fabric of the church. It may also mean a gift for the benefit of the persons who at the date of the testator's will, or his death, were the persons who formed the choir of Oakham Church. That is a possible meaning, and a member of the choir has been added as a respondent to these proceedings for the purpose of arguing that that view is the right one. It is right that I should say at this point that counsel for that respondent was under a duty to argue it inasmuch as his client was a representative of a number of persons, some of whom were infants, and could not therefore give up any benefit to which they were justly entitled. He has therefore argued on their behalf that the gift is one for the benefit of members of the choir.

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I must reject that meaning, because it is quite clear, in my view, that the gift is not intended to be personal to the particular members of the choir, but rather has an impersonal meaning, which I may state thus. Where a testator gives a sum (and in this case a very substantial sum, not only a pecuniary legacy of 1000*l.*, but also a share of the residuary estate, which may amount to as much as 12,000*l.*) for the benefit of the choir he intends an impersonal gift, namely, a gift for the advancement and improvement of the musical services in the church by means of a choir. I think that that is the natural meaning which should be attributed to a bequest of this kind where the testator gives the money to the vicar and churchwardens for the benefit of the choir. The expression is a loose one, but the testator is looking to the improvement of that part of the church service which consists of music, and, in particular, of the choir, and it is that which he intends by the words used. Therefore I find as a matter of construction that the gift is one for the maintenance and improvement of musical services in the church of Oakham, particularly by means of a choir.

The next question arises as to the validity of the gift. I am bound to say that I should have had no doubt whatever as to its validity. I was, however, faced with a decision given nearly 200 years ago by Lord Hardwicke in *Attorney-General* v. *Whorwood.* (1) The following passage appears not, indeed, as part of the judgment in that case, but as part of the argument and the interlocutory observation of the Lord Chancellor: "In *Attorney-General* v. *Oakaver*, February, "1736, the Master of the Rolls established a stipend"—by "established" is meant "held valid"—"given to keep "up an organ and for the organist: but as to 40*l.* per annum "to the choristers he refused it: on appeal your Lordship "affirmed the decree; as the choristers never were allowed "in parochial churches. The Lord Chancellor said, what he "went on was, that it was contrary to the constitution of the "Church of England to have them in parochial churches and "that they would be under no rule of government as they are "in other churches; and the law would not allow they should

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(1) 1 Ves. Sen. 534.

"be under the government of the heir-at-law," then the observation closes with a dash. What his Lordship meant to add nobody will ever know. Therefore I have the Lord Chancellor's statement (if it is accurately reported) that, at least in the year 1736, it was contrary to the constitution of the Church of England to have choristers in parochial churches. It has been suggested that that is an authority binding on me and precludes me from holding that a gift for the improvement of musical services in a church through a choir is a valid gift.

On that decision of the Lord Chancellor there appears to have been remarkably little comment, but in Tyssen's Law of Charitable Bequests, 2nd ed., after a reference to the case which I have just cited, it is stated, at p. 84: "It may be "doubted, however, whether a bequest for choristers in a "parish church would now be held void as being illegal. In "*Turner* v. *Ogden* (1) a very similar gift was considered to be "charitable, and in *In re Hendry* (2), North J. seems to have "considered a choir fund to be a charitable object."

I think I am right in saying that in neither of those cases was the attention of the Court called to the decision of Lord Hardwicke. But, however that may be, it seems to me clear that in the year 1940, when one considers the constitution of the Church of England and its practice over these many centuries, it is impossible to hold that there is any illegality in having in a parochial church choristers or a choir, and having musical services conducted with their aid. What perhaps the Lord Chancellor had in mind when he said that it was contrary to the constitution of the Church of England to have choristers in a parochial church was no more than that, as distinguished from a cathedral or collegiate church, of which the choristers might still remain part of the body, in parochial churches undoubtedly after the Reformation the choristers were not recognized as part of the church body or organization. But to say that it was illegal to have a choir in a parish church then or at any other time appears to me to be a proposition for which there is no authority.

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(1) 1 Cox Eq. Cas. 316. (2) (1887) 56 L. T. 908.

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Counsel have not been able to suggest that now or, as I say, in these many centuries past it has ever been suggested that there was any illegality in having in a parish church a choir or choristers who would assist in the religious services there carried on. Accordingly it seems to me impossible now to say that there is any illegality in this gift which is intended, by means of a choir, to maintain and improve the religious services of the church. If that is so, that is the end of the matter. Here I have a valid gift which has to be devoted to that charitable purpose, for that it is charitable is beyond question, being a gift for the advancement of religion by a particular mode.

That brings me to the last question. It has been suggested that, if the fund is to be devoted only to those purposes which fall strictly within the terms of the gift as I have construed it, there may be an excess left over, and it is argued that that excess must go to the next-of-kin on the footing that there is no general charitable intent but only a particular charitable intent, and, if there is a particular charitable intent which is satisfied before the fund is exhausted, the balance must go to the next-of-kin. That involves the consideration of the question whether there is a general, or only a particular, charitable intent. That is a very artificial distinction.

In *In re Wilson* (1) Parker J., after a consideration of the cases, divided them as follows. He said: "First of all, "we have a class of cases where, in form, the gift is given "for a particular charitable purpose, but it is possible, taking "the will as a whole, to say that, notwithstanding the form of "the gift, the paramount intention, according to the true "construction of the will, is to give the property in the first "instance for a general charitable purpose rather than a "particular charitable purpose, and to graft on to the general "gift a direction as to the desires or intentions of the testator as "to the manner in which the general gift is to be carried into "effect." A little later he said: "Then there is the second "class of cases, where, on the true construction of the will, "no such paramount general intention can be inferred, and

(1) [1913] 1 Ch. 314, 320.

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"where the gift, being in form a particular gift—a gift for a "particular purpose—and it being impossible to carry out "that particular purpose, the whole gift is held to fail. In "my opinion, the question whether a particular case falls "within one of those classes of cases or within the other is "simply a question of the construction of a particular "instrument." In this case, therefore, I have to construe this instrument to see within which class of cases it falls.

First, I must observe that here I need only deal with a share of residue. There is no question about the legacy of 1000*l.* being applied for the particular charitable purpose modo et forma. With regard to the residue, I find that the testator has given a share of it for the same purpose. He did not, and could not, know within precise limits to what that share of residue would amount. He must be taken, therefore, as having given a sum unquantified for the benefit of the choir, and that leads one to the suspicion that he must have had in mind the possibility of a particular mode of charity being satisfied before that share of residue was exhausted.

It is next to be observed that this is a perpetual gift given out and out to the vicar and churchwardens, and in more than one case it has been held that a gift out and out to a vicar and churchwardens or to any body of trustees is an indication that the testator intended the whole of the fund to be employed, if not in a particular mode, then according to a general intent.

Next (and I think that this is a consideration which appeals most to me) a gift simply for the musical services in a church is not charitable unless there is an underlying charitable intention. The charitable intention (and I use the word "charitable" in its legal sense) in giving money for the purpose of musical services in a church is for the advancement of religion, and it is only the particular mode of carrying out that intent which is indicated when the testator directs that it is to be applied in the promotion of musical services.

I find, therefore, that the real intent of the testator was the advancement of religion through musical services; and if that is the real meaning of his words, then I have a

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general charitable intent to which effect can and ought to be given if the fund is more than sufficient for carrying out that general charitable intent by a particular mode.

Lastly (and this, again, is, within my recollection, a matter which has influenced the Court in determining into which of the two categories of cases a particular gift falls) I find the gift of residue to be one of several gifts, all charitable, to which the testator has devoted his residuary estate, and that, I think, is a factor which has more than once been taken into account in determining whether there is a general charitable intent.

Accordingly, on all those grounds (to which, perhaps, I should add the authority of *In re Monk* (1), the last case, I think, on this branch of the law to come before the Court of Appeal), I must come to the conclusion here that there is a general charitable purpose. Accordingly, I must direct a scheme to be settled for the establishment of the charity constituted by these two gifts, the pecuniary legacy and the gift of the share of residue.

Solicitors: *Peacock & Goddard, for Adam & Dalton, Oakham; G. Stevenson & Son, Leicester; Horne & Birkett; The Treasury Solicitor.*

H. L. L.

(1) [1927] 2 Ch. 197.

# KING FEATURES SYNDICATE, INCORPORATED *v.* O. AND M. KLEEMAN, LIMITED.

[1938. K. 477.]

SIMONDS J.

1940

March 6, 7, 20.

*Copyright—Infringement—Sketches and drawings—Comic figure as central feature—Publication in American and Canadian newspapers over series of years—Licences granted to make and sell dolls and toys representing figure—Similar dolls and toys imported and sold without consent of copyright owners—Reproduction of substantial part of original work in three dimensions—Not a registrable design—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1, 22—*Patents and Designs Acts,* 1907 *to* 1932.

Between 1929 and 1937 a very large number of sketches and cartoons, of a type known as "comic strips," were produced by E. C. S. and published in American and Canadian newspapers, all embodying as their central feature a grotesque figure dressed in nautical costume, having easily recognized peculiarities, and described and popularly known as "Popeye, the Sailor." The figure having also been popularized by reproduction in English newspapers, the plaintiffs, who claimed copyright in the sketches, granted licences to British firms to make and sell dolls, mechanical toys, brooches and other articles featuring the figure of "Popeye." The defendants applied for licences, but refused to accept the plaintiffs' terms. They afterwards imported and sold large consignments of similar dolls, toys and brooches under the name of "Popeye" dolls, etc. The plaintiffs claimed an injunction to restrain the defendants from infringing their copyright, and damages for infringement and conversion. The defendants denied infringement and contended that the sketches were "designs" within s. 22 of the Copyright Act, 1911, and not the subject of copyright:—

*Held,* (1.) that the plaintiffs' copyright had been infringed by the reproduction of the sketches by a toy figure in three dimensions;

(2.) that the dolls and toys sold by the defendants reproduced a substantial part of the plaintiffs' work, though in fact copied directly from articles made by the plaintiffs' licensees;

(3.) that the plaintiffs' sketches were not "designs" capable of being registered as such under the Patents and Designs Acts, 1907 to 1932, and were therefore not excepted from artistic copyright by virtue of s. 22 of the Copyright Act. The Patents and Designs Acts offered protection, like the Copyright Act, 1911, not for an abstract idea, but for its embodiment in concrete form and the sketches contained no features of shape, configuration, pattern or ornament applied to any article by any industrial process or means within the definition of "design" under the former Acts.

*Con Planck, Ld.* v. *Kolynos, Inc.* [1925] 2 K. B. 804; *Pytram, Ld.* v. *Models (Leicester), Ld,* [1930] 1 Ch. 639, and *Burke* v. *Spicers Dress Designs* [1936] Ch. 400 discussed and distinguished.

ACTION.

The facts are fully stated in the judgment, but may be summarized shortly as follows :—

Between 1929 And 1937 an American artist, Elzie Crisler Segar, drew over 2000 small comic sketches or cartoons, afterwards published in American and Canadian newspapers in series of " comic strips " under the title of, and embodying a grotesque figure dressed in nautical costume known as, " Popeye, the Sailor." Segar died in 1938, and the second plaintiff, Betts, was his legal personal representative. The plaintiffs claimed to be entitled to copyright in these sketches and sought to restrain the defendants from infringing their copyright by the importation of dolls, brooches and toys embodying a similar figure and sold under the name of "Popeye" dolls, etc. The defendants denied that any copyright existed in the sketches. They further denied infringement and contended that the plaintiffs' sketches were designs capable of being registered as such under s. 22 of the Copyright Act, 1911. (1)

*E. J. Macgillivray K.C.* and *Frank Gahan* for the plaintiffs. From 1929 to 1937 an immense number of " comic strips " containing a figure with distinctive characteristics known as "Popeye" or " Popeye, the Sailor" were published. For convenience the plaintiffs have selected the first strip published and fifty-four other typical strips and it is admitted that if the plaintiffs cannot succeed on these they cannot succeed at all. Each of these strips was admittedly first published in New York and was published in Canada within fourteen days thereafter, so that by virtue of the relevant Canadian legislation and a certificate duly given under s. 25 of the Copyright Act, 1911, these strips are copyright in the United Kingdom unless excluded from copyright by s. 22. If copyright exists it is admittedly in one of the plaintiffs.

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(1) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 22: "(1.) This "Act shall not apply to designs "capable of being registered under "the Patents and Designs Act, "1907, except designs which, "though capable of being so "registered, are not used or in-"tended to be used as models or "patterns to be multiplied by any "industrial process."

By s. 1, sub-s. 2, of the Act, copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever. This includes the reproduction of a two dimensional work in three dimensions. The Act has changed the law in this respect, the words " any "material form " are new in the Act. The question is one of fact: *Hanfstaengl* v. *H. R. Baines & Co., Ld.* (1); *Bradbury, Agnew & Co.* v. *Day.* (2) In *Burke* v. *Spicers Dress Designs* (3) the frock qua frock, a mass of non-rigid material, could not be said to be a reproduction of the picture; whereas in *Chabot* v. *Davies* (4), the shop front was a reproduction of the design. The test is whether looking at the alleged infringement one sees in one's mind's eye the copyright work, in this case the essential characteristics that throughout the drawings everyone recognizes as " Popeye." In American cases, on wording less favourable to the plaintiffs than the English Act, the copyright in other comic strip drawings owned by the present plaintiffs has been held to have been infringed by the making of toys: *King Features Syndicate, Inc.* v. *Fleischer.* (5) The defendants have infringed the plaintiffs' copyright by authorizing in this country the making of toys and brooches in Japan and by importing into and selling them in this country knowing that if made in this country they would have infringed copyright.

On the point under s. 22, the plaintiffs admit that before any of the alleged infringements they had granted licences authorizing the making of " Popeye " toys and brooches. By s. 93 of the Patents and Designs Act, 1907 (6), as amended by s. 19 of the 1919 Act, a design consists in the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means which in the finished article appeal to and are judged solely by the eye. The toys and brooches for which licences were granted were intended to be reproduced in more than fifty articles, and so by the combined effect of s. 22 of the Copyright Act and r. 92 made under the Act by the Board of Trade, the Act does not apply to the design for those toys and brooches. But the sketches and cartoons for which the plaintiffs claim copyright are not designs. There is a distinction between a drawing or painting and a design, and the exclusion of the later design from protection does not in any way affect the overriding copyright in the earlier drawing. In *Pytram, Ld.* v. *Models (Leicester), Ld.* (1), there was no source behind the model there made, whereas copyright is here claimed in the drawings. The defendants are not protected by having copied the drawings indirectly by copying the toys and brooches for which the plaintiffs had granted licences. They had thereby reproduced the copyright works and so had infringed the copyright.

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(1) [1895] A. C. 20.

(2) (1916) 32 Times L. R. 349.

(3) [1936] Ch. 400.

(4) (1936) Macg. Cop. Cas. 56; [1936] W. N. 308; 155 L. T. 525.

(5) (1924) 299 Fed. Rep. 533.

(6) Patents and Designs Act, 1907 (as amended by the Act of 1919), s. 93: " 'Design' means "only the features of shape, con- "figuration, pattern, or ornament "applied to any article by any "industrial process or means, "whether manual, mechanical or "chemical, separate or combined, "which in the finished article "appeal to and are judged solely "by the eye; but does not include "any mode or principle of con- "struction, or anything which is "in substance a mere mechanical "device."

[Reference was also made to *Saunders* v. *Wiel* (2); *Dean's Rag Book Co., Ld.* v. *Pomerantz & Sons* (3); and *Con Planck, Ld.* v. *Kolynos, Inc.* (4)]

*K. E. Shelley K.C.* and *A. D. Russell-Clarke* for the defendants. There are two questions to be determined. (1.) Apart from s. 22 of the Copyright Act, 1911, is there any infringement of that in which copyright is claimed to exist? (2.) Assuming that the articles imported and sold by the defendants would be infringements of the plaintiffs' copyright, are they exempted therefrom by s. 22 as being designs capable of registration as such under the Patents and Designs Acts, 1907 to 1932?

On the first point, there is no copyright in ideas or a plot. What the plaintiffs are claiming copyright in is not any particular sketch or cartoon, but in a fictional character which they have popularized under the name of "Popeye,

(1) [1930] 1 Ch. 639.
(2) [1893] 1 Q. B. 470.
(3) (1930) 47 R. P. C. 485.
(4) [1925] 2 K. B. 804.

"the Sailor." It is admitted that it is possible to infringe copyright in a drawing by a reproduction in three dimensions, but in fact that is not what has been done here. No particular cartoon has been copied, but dolls and other articles have been made resembling in some respects one of the characters which appear in these cartoons. In *Burke* v. *Spicers Dress Designs* (1) the production of a frock made to fit a particular model was held by Clauson J. to be no infringement of a sketch of another frock.

In *Bradbury, Agnew & Co.* v. *Day* (2) the whole Punch cartoon was reproduced as a tableau vivant. Copyright is only claimed in fifty-five out of 2000 newspaper strips, and there is nothing to show that the dolls and toys may not have been copied from a sketch in which no copyright is claimed or in fact exists. In some details the dolls differ considerably from the sketches. They are not copies or reproductions or imitations of any particular original, except of the original idea which they embody: see *Hanfstaengl* v. *Baines & Co.* (3); *Dean's Rag Book Co., Ld.* v. *Pomerantz & Sons.* (4)

On the second point, it is submitted that the sketches or cartoons having been made the subject of "Popeye" dolls made by the plaintiffs' licensees, they come within the definition of a "design" contained in s. 93 of the Patents and Designs Acts, 1907 to 1932. They have been applied to an article, a doll, or a brooch, or some other toy, by a mechanical process, and therefore are excepted from copyright under s. 22 of the Copyright Act, 1911. They are used or are capable of being used as a model or pattern to be multiplied by an industrial process: see *Pytram, Ld.* v. *Models* (*Leicester*), *Ld.* (5) In that case Clauson J. held that a model of a wolf cub's head intended to be displayed on tops of poles as totems by the Boy Scouts' Association was a design within the exception of s. 22 and not the subject of copyright. If a piece of sculpture is a design, then sketches such as these, which repeat a pattern, are equally designs. These "comic strips" are not in the same class as ordinary pictures. The drawings are of such a kind as are capable of being reproduced in the form of a doll and multiplied by industrial process.

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(1) [1936] Ch. 400, 404.
(2) 32 Times L. R. 349.
(3) [1895] A. C. 20.
(4) 47 R. P. C. 485.
(5) [1930] 1 Ch. 639.

[The following cases were also referred to: *Wood* v. *Stoddarts, Ld.* (1); *Ware* v. *Anglo-Italian Commercial Agency* (*No.* 2) (2); *Pugh* v. *Riley Cycle Co., Ld.* (3)]

*Macgillivray K.C.* in reply. What is the article to which the design is said to be applicable? In *Pytram's* case (4) and other cases it was the article in respect of which copyright was claimed, such as the wolf's head. It clearly came within the definition in s. 93 of the Patents and Designs Acts. The same argument does not apply to those drawings. If it did, then every photograph and drawing and picture would be a design capable of registration. Features of configuration are necessary to a design. *Con Planck* v. *Kolynos, Inc.* (5) There must be a conception of certain features to be applied to a certain article.

*Cur. adv. vult.*

1940. Mar. 20. SIMONDS J. The plaintiffs, King Features Syndicate, Inc., are an American corporation. The plaintiff, Frank Cecil Betts is the personal representative of Elzie Crisler Segar, an American artist who died on October 13, 1938. Segar was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as "Popeye," or "Popeye, the "Sailor." It is admitted that if there is copyright in these drawings or cartoons, which were published from the year 1929 onwards in the United States of America and simultaneously in Canada, it is vested in the plaintiffs or one of them.

The defendants, O. and M. Kleeman, Ld., have, without the consent of the plaintiffs, caused to be made and imported into the United Kingdom, and have there sold, representations in various forms of a figure which they admit to be the figure of a sailor, and the plaintiffs claim to be the figure of "Popeye, "the Sailor." The material forms in which this figure is embodied are brooches or charms, plaster dolls, and mechanical toys largely composed of celluloid.

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(1) (1931) Macg. Cop. Cas. (1928–35) 294.
(2) (1923) Macg. Cop. Cas. (1917–23) 371.
(3) (1912) 29 R. P. C. 196.
(4) [1930] 1 Ch. 639.
(5) [1925] Ch. 810.

Apart from the serious question which arises under s. 22 of the Copyright Act, 1911, it is not disputed that the drawings in question, so far as they have been published in Canada simultaneously with publication in the United States of America, are "artistic work" in which copyright subsists under s. 1 of the Act of 1911, nor that under s. 1, sub-s. 2, of that Act the sole right to produce or reproduce such work or any substantial part thereof in any material form whatsoever is vested in the plaintiffs.

By s. 22 it is provided that the Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907 (now the Patents and Designs Acts, 1907 to 1932), with the exception therein contained.

The questions which I have to determine are (1.) whether, apart from s. 22 of the Act, the brooches, dolls, toys, or any of them are such reproductions in a material form of the plaintiffs' work as to constitute infringement of copyright, and (2.) whether in any case the work in which the plaintiffs claim copyright consists of designs which are capable of being registered under the Patents and Designs Acts and do not fall within the exception contained in s. 22.

Some further facts must be stated before these questions can be determined. The figure of "Popeye" is the central figure of a great many comic strips, running, it was said, into many thousands, which appeared in newspapers and journals in the United States of America and in Canada, and afterwards in this country. It is not to be doubted that his face, features, figure and general get-up became very popular and well known. His obvious peculiarities made it easy both to recognize and to imitate him. It was therefore natural that the plaintiffs should try to exploit his popularity in another medium, and accordingly in or before the year 1937 they granted licences to certain persons or companies, among others Cecil Coleman, Ld., and Moritz and Chambers, Ld., to manufacture and sell in the United Kingdom brooches and mechanical dolls of certain types, simulating the figure of "Popeye." Large quantities of such articles were sold and the plaintiffs were paid substantial sums by way of royalty.

The defendants, who are manufacturers and vendors of toys, saw possibilities of doing business. They first approached a firm or company whom they addressed as "The Paramount "Films," under the impression that they were the owners of the copyright, and it is significant that they asked: "On "what terms are you prepared to issue a licence to us for the "marketing of 'Popeye, the Sailor.'" They had then no doubt either of the unique character of "Popeye" or of the subsistence of copyright in the plaintiffs' work. Eventually they got into touch with the plaintiffs, but were unable to accept the terms on which a licence was offered.

In the meantine they had been in correspondence with one of their directors then travelling in Japan, to whom they had on February 24, 1937, sent a sample which they thus described: "A sample of brooch, Popeye Sailor, which is being sold in "large quantities to showmen," adding: "It is being sold "by Cecil Coleman at 12*s.* per gross, and I think we could do "quite a big business in this." As the result of this letter an order was given to Winckler & Co., of Kobe, and goods were despatched by them to the defendants in the United Kingdom, which were invoiced with the description, "Popeye Brooches, "each on a card, 200 gross, 5*s.* 6*d.* per gross." The sterling value of the consignment was stated to be approximately 400*l.* This was followed by numerous other consignments of similar brooches, one consignment alone being of 2000 gross, and at a later date by consignments of celluloid mechanical figures and plaster dolls described as "Cell. Popeye," or "Plaster "filled Popeye," or "Clay filled figure Popeye," or "Mechanical "Popeye toy," or by some similar title. Some of these importations were made after the writ in this action had been issued, but I was invited by counsel on both sides to ignore that fact for the purpose of my decision.

The plaintiffs claim that all the articles so imported infringe their copyright. They further claim that their copyright has been infringed by the designs annexed to two applications made by the defendants in September and November, 1937, for registration under the Patents and Designs Act. These are designs respectively of the brooch and doll which the defendants had imported from Japan. Perhaps these applications may be regarded as a manœuvre in the contest between the parties. The issue is sufficiently raised by the articles which have been imported and sold.

The first question which has been debated is whether, where the artistic work in which copyright is claimed is a drawing in two dimensions, it can be infringed by something such as a toy figure which is in three dimensions. It appears to me that the introduction into s. 1 of the Copyright Act, 1911, of the words "in any material form whatsoever," which were not in the Fine Arts Copyright Act, 1862, lays at rest any doubt which might have been felt on this point. This was the view taken by Coleridge J. in *Bradbury, Agnew & Co.* v. *Day* (1), in which he held that so-called "living pictures" might be possible subjects of infringement of copyright in an artistic work. It would, in my judgment, be contrary to the plain meaning and spirit of the Act if a copy of an artistic work were an infringement only if made in the same dimensions, so that, for example, copyright in a sketch would not be infringed if the exact design were reproduced either in a frieze made with some measure of relief or in a sculptured pediment.

It may be that where an artistic work in two dimensions is reproduced in a different medium in three dimensions, much will be added to it by the genius of the reproducer, and it may be difficult to recognize the original in the reproduction. But the same difficulty arises in literary copyright where the original is a novel and the alleged infringement a drama, or in musical copyright where the original is an operatic air and the infringement a piece of dance music embodying some part of it. This only means that the question of infringement of copyright is usually a question of degree and that, where the medium is not the same, the question is apt to be one of greater difficulty. The defendants have relied on the decision of Clauson J. in *Burke* v. *Spicers Dress Designs, Ld.* (1) But there is nothing in the learned judge's judgment to suggest that he thought that there could not be infringement of copyright in a sketch by reproduction in a three-dimensional form. He decided merely that in that case there was no infringement.

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(1) 32 Times L. R. 349.

Next, it was argued on behalf of the defendants that the alleged infringing articles did not reproduce any substantial part of the plaintiffs' work, and in this connection it was contended that they could not be reproductions of the plaintiffs' work because they were copied from the articles made by the plaintiffs' licensees, who had themselves made use of the plaintiffs' work. The latter contention is untenable. It must be immaterial whether the infringing article is derived directly or indirectly from the original work. The standard is objective; the question is whether the original work or a substantial part thereof has been reproduced. If it has been, then it is no answer to say that it has been copied from a work which was itself, whether licensed or unlicensed, a copy of the original.

For this proposition there is amply authority: see, for example, *Hanfstaengl* v. *Empire Palace, Ld.* (2), where Stirling J. cited and applied the words of Blackburn J. in *Ex parte Beal* (3): " Where the subject of a picture is copied, it "is of no consequence whether that is done directly from the "picture itself or through intervening copies." This view of copyright law has never, I think, been doubted, and is plain commonsense.

The question then is: Do the defendants' articles reproduce the plaintiffs' work or a substantial part thereof? In my judgment, they clearly do. " A copy," said Bayley J. in *West* v. *Francis* (4), "is that which comes so near to the original "as to give to every person seeing it the idea created by the "original." Whatever test is applied or definition used it remains a question of degree whether there is sufficient resemblance to constitute infringement. In the present case the characteristic peculiarities which persist through scores of drawings of "Popeye" are repeated in the brooches, toys, and dolls. These articles recall, as they are meant to recall, to the mind of the public the familiar figure which they have so often seen in the newspaper comic strips. They are called "Popeye" brooches or toys or dolls just in order to attract the attention of a friendly clientèle. It cannot be doubted that here is the essential "Popeye" greeting his admirers in a new material form.

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(1) [1936] Ch. 400.

(2) [1894] 3 Ch. 109, 116.

(3) (1868) L. R. 3 Q. B. 387, 394.

(4) (1822) 5 B. & Ald. 737, 743.

A final argument on this part of the case must be noticed. Mr. Macgillivray, for the plaintiffs, in opening the case, said that of the thousands of drawings of "Popeye" which had appeared he had selected fifty-five, so as not to overburden the Court, and was content to rest his case on them. These fifty-five were all admitted to have been published in Canada. On this, Mr. Shelley, for the defendants, contended that as the defendants' articles were admittedly copied from the articles made by the plaintiffs' licensees, and as it had not been proved or admitted that the latter articles had been copied from the fifty-five rather than any other of the thousands of drawings, or that any other drawing than the fifty-five had been published in Canada simultaneously with publication in the United States of America, it was not proved that any copyright had been infringed. I should not think it necessary to notice this somewhat unattractive argument had it not been developed at some length. It is, in my opinion, ill-founded. No such plea is to be found in the defence, and it rests on taking out of its context part of counsel's opening statement. Mr. Macgillivray did not differentiate between the selected fifty-five drawings so far as publication was concerned, and made no admission on which Mr. Shelley could rely for the suggestion that there were "Popeye" drawings in which no copyright subsisted.

I come, then, to the conclusion that apart from s. 22 of the Act the plaintiffs owned copyright in the "Popeye" drawings and that the defendants have in each of the articles infringed it.

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I turn to the question whether the plaintiffs' sketches are designs capable of being registered under the Patents and Designs Acts, 1907 to 1932. If they are such designs, then copyright under the Copyright Act cannot be claimed for them unless they fall within the exception, that is, unless they are not used or intended to be used as models or patterns to be multiplied by any industrial process.

What are " designs capable of being registered " under the relevant Act ? Under the Patents and Designs Acts, 1907 to 1932 : " ' Design ' means only the features of shape, "configuration, pattern or ornament applied to any article by "any industrial process or means, whether manual, mechanical "or chemical, separate or combined, which in the finished "article appeal to and are judged solely by the eye, but does "not include any mode or principle of construction "—(s. 19 of the Patents and Designs Act, 1919). This definition presents many difficulties when read in conjunction with the Copyright Act. Sect. 22 of that Act assumes the possibility of the existence of something in which copyright might subsist, and which yet is capable of registration under the Patents and Designs Acts. I must make the same assumption, and for this purpose must proceed so far as I can on the footing that, just as the Copyright Act affords protection not for ideas but for the embodiment of ideas in the form of words or music or artistic works, so the Patents and Designs Acts afford protection not for an abstraction but for features of shape, configuration, and so on, "applied to "any article by any industrial process or means" ; so that in each case it is the concrete form, not the abstract idea, which is protected. If it were not so, no effect could be given to s. 22 of the Copyright Act, for it would not be possible to correlate the two Acts.

It is important to bear this in mind, for " design " in relation to art may in ordinary usage mean either (1.) a plan, idea, or conception, or (2.) the artistic idea as executed or the combination of artistic details which go to make up the picture or other work of art, and it is difficult to avoid the conclusion that the distinction has not been clearly observed in the definition and treatment of "design" in the Patents Acts. For instance, the same design may be registered in more than one class. It is something, then, which may be applied to different sorts of articles. It is surely, then, a conception which may be applied to a material article, not a material article to which a conception has been applied. But if in truth a "design" is only a conception, then no artistic work to which the Copyright Act would otherwise apply is capable of registration as a design, for the Copyright Act gives no protection to ideas. Further, the protection which the Patents Acts give to designs, design-copyright as it may be called, is the exclusive right to apply a design to articles in a particular class, not the exclusive right to copy or reproduce an artistic work in any material form. It is, I think, apparent that the marriage of copyright under the Copyright Act and design-copyright under the Patents Acts in s. 22 of the former Act must lead to serious confusion, and so in truth it has.

In *Pytram, Ld.* v. *Models (Leicester), Ld.* (1), the question arose with regard to a model of a wolf cub's head produced from a mould in papier maché and intended to be displayed as their totem on the tops of poles by the Boy Scouts' Association. This was an artistic work in which the plaintiffs had copyright apart from s. 22 of the Act, and the problem was whether s. 22 of the Act applied so as to exclude that right. Clauson J. held that the model fell within the definition of "design" in the Patents Acts. He must, I think, be taken to have rejected with regard to works of sculpture the argument addressed to him on behalf of the plaintiffs to the effect that application to an article means application to an article which does not exist merely as a vehicle for the expression of the artistic conception, for he said: "As I read the Act, the "copyright in that article of sculpture is given to the author "of it in the first instance, but that copyright is taken away "by the first part of s. 22 (as would at all events in many "cases, if not all, be the fact) the sculpture comes within the "term 'design' as defined in the Act of 1907 and is accordingly "capable of being registered under that Act," and later on:

(1) [1930] 1 Ch. 639, 646.

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"I see no escape from the position that this model was a "design capable of being registered under the Act." What is true of the model of a wolf cub's head must be true of the model of anything else, and I must regard this decision as an authority for the proposition that every piece of sculpture is, prima facie, a " design " capable of registration under the Patents Acts.

In *Wood* v. *Stoddarts, Ld.* (1), the same view was taken by Farwell J. with regard to a plaster model of the human figure or of an animal made for the purpose of casting metal toys. The learned judge held that such models were capable of registration and therefore were not protected by the Copyright Act.

So far I have considered the case of sculpture. I turn to what I think is the only authority on the application of s. 22 to artistic drawings or sketches. In *Con Planck, Ld.* v. *Kolynos, Inc.* (2) the plaintiffs were the owners of the copyright, if it subsisted, in two sketches for cut-out advertisement showcards representing a pierrot and pierrette with large faces and diminutive bodies, and the question was whether these sketches were designs capable of registration under the Patents Act. Sankey J. (as he then was) held that they were, but perhaps the important part of his judgment is that he by no means laid down the proposition that all sketches or all pictures are " designs " capable of registration. On the contrary, while holding that the particular sketches were " designs," he was disposed to favour the view that " a design is something produced as a pattern to assist "one in making some other article: a thing which has no "market in itself but is meant to be applied to some "other article." This is the view which had been expressed in Copinger's Law of Copyright, 5th ed., but was, at any rate with regard to works of sculpture, rejected by Clauson J.

I am not aware of any other case which can guide me. Cases such as *Ware* v. *Anglo-Italian Commercial Agency, Ld.* (3),

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(1) Macg. Cop. Cas. (1928–35) 294.
(2) [1925] 2 K. B. 804.
(3) Macg. Cop. Cas. (1917–23) 346.

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in which a drawing is intended to be a design for a commercial article, do not throw any light on the matter.

If the defendants are right in saying that the plaintiffs' sketches here in question are capable of registration, then all sketches are capable of registration; and, if all sketches, then all paintings. I cannot differentiate. For example, a picture exhibited in the Royal Academy is capable of registration as a design. It may or may not fall within the exception. That might depend on whether it was used as a pattern to be multiplied by the industrial process of photography or any other process. Must I hold that this is the law?

I do not think, though perhaps the distinction is a fine one, that the cases on works of sculpture or models are decisive with regard to sketches. It may be, as Clauson J. said in *Pytram, Ld.* v. *Models* (*Leicester*), *Ld.* (1), that there is no escape from the position that a model is capable of registration as a design. In the model itself there are features of shape or configuration applied to an article—that is, a substance artificial or natural. It might, I would respectfully suggest, be open to question whether the features had been applied to the article by any "industrial process or means." But, however that may be, if the question is asked whether (say) an oil painting comes within the definition "the features of "shape, configuration, pattern or ornament applied to any "article by any industrial process or means . . . ," to me, at least, the answer seems a simple one—that it does not. If it does not, an oil painting cannot be registered as a design.

It appears to me that the distinction, to which Sankey J. referred in *Con Planck, Ld.* v. *Kolynos, Inc.* (2), is, with regard to sketches, a valid one. It is repeated in Copinger's Law of Copyright, 7th ed., at p. 67, where the subject is treated with admirable lucidity. If I look at a picture and ask myself whether it is an article to which by some industrial process or means features of shape, configuration, pattern or ornament have been applied, I am equally at a loss to know what is the article to which by some industrial process or

(1) [1930] 1 Ch. 639. (2) [1925] 2 K. B. 804.

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means features of shape and so on have been applied, and what is the industrial process or means by which they have been applied; and I see no reason why I should enlarge the plain meaning of the definition in order to bring within it the case of an ordinary painting, drawing, or sketch.

I have abstained from considering the general rules which were by s. 22, sub-s. 2, of the Copyright Act authorized to be made under s. 86 of the Patents Act, 1907, for determining the conditions under which a design is to be deemed to be used as a model to be multiplied by any industrial process. For it cannot, in my judgment, assist in solving the question whether a picture is capable of registration as a design under the Patents Act to read the rules which are made to determine whether for the purpose of the Copyright Act a design otherwise registrable is to be excepted.

I come to the conclusion that the plaintiffs' sketches are not capable of registration as designs and that they are therefore protected by the Copyright Act.

I will grant the appropriate injunction and direct the usual inquiry as to damages for infringement and conversion. The defendants must pay the costs of the action.

Solicitors: *Shaen, Roscoe, Massey & Co.*; *Derick R. Martin & Co.*

H. L. L.

## *In re* CLAYTON.

## COLLINS *v.* CLAYTON AND READE.

[1935. C. 1975.]

MORTON J.

1940
March 12

*Solicitor—Costs—Administration action—Sale of part of property comprised in estate—Solicitors acting in action and sale—Proceeds of sale paid into Court—Statutory power to make charging order—Extent of power—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69.

Under s. 69 of the Solicitors Act, 1932, any Court in which a solicitor has been employed to prosecute or defend a suit, matter or proceeding may declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding.

On p. 2371 of the Annual Practice, 1940, is the following note: "Charging order for costs on property 'recovered or preserved' "—see Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 69. . . . . "Extent of.—This statutory power given to the Court in aid of "the common law right, see *Re Born* [1900] 2 Ch. 433, unlike "the lien upon papers, is confined to the costs, charges and "expenses incurred in respect of the particular property "'recovered or preserved,' . . . .; it is not a general charge for all "costs (*Bozon* v. *Bolland* (1839) 4 My. & Cr. 354; *Mackenzie* v. "*Macintosh* (*sic*) (1891) 64 L. T. 706; *Waterland* v. *Serle* [1897] "W. N. 163) . . . . " (1)

The solicitors to the defendants in an administration action acted also as their solicitors on a sale of part of the property comprised in the estate, the proceeds of sale being paid into Court.

On a summons by the solicitors for a charging order on the fund in Court for their costs, not only in respect of the property "recovered or preserved" (i.e., the fund in Court) but of the whole of the action, down to and including the summons for the charging order:—

*Held*, that the statutory power of the Court extends more widely than is stated in the note on p. 2371 of the Annual Practice, 1940, extending, in fact, to the whole of the costs of the solicitor in reference to the whole of the action: but that, as a matter of principle, the Court's order ought to be limited to the costs properly incurred by the solicitor in recovering and preserving the property. The Court proceeds on the principle that the solicitor is to be rewarded to the extent of receiving those costs: and in the present case there was no reason to depart from the general principle and give the solicitors a wider charge.

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(1) Sect. 69 of the Solicitors Act, 1932: "Any court in which a "solicitor has been employed to "prosecute or defend any suit, "matter or proceeding may at "any time declare the solicitor "entitled to a charge on the pro"perty recovered or preserved "through his instrumentality for "his taxed costs in reference to "that suit, matter or proceeding, "and may make such orders for "the taxation of the said costs "and for raising money to pay, "or for paying, the said costs out "of the said property as they "think fit, . . . ."

The cases quoted as authority for the statement in the note on p. 2371 of the Annual Practice, 1940, do not establish that statement. The note is based on a passage in Lindley L.J.'s judgment in *Mackenzie* v. *Mackintosh* (1) which, in its context, does not establish what is said in the note.

*Greer* v. *Young* (1883) 24 Ch. D. 545; *Emden* v. *Carte* (1881) 19 Ch. D. 311; *Turnbull* v. *Richardson* (1884) 1 Times L. R. 244, and *Scholey* v. *Peck* [1893] 1 Ch. 709, followed.

*Charlton* v. *Charlton* (1883) 49 L. T. 267; *In re John Clayton, Ld.* (1905) 92 L. T. 223; and *In re Knight* [1892] 2 Ch. 368, distinguished.

PROCEDURE SUMMONS.

This summons was adjourned into Court as a procedure summons on the application of Arthur Savage Cooper and Cyril Frederick Wright (hereinafter called "the applicants"). They had acted as solicitors for the defendants in an administration action in which the plaintiff was Mrs. Peggy Collins (hereinafter called "the plaintiff" a creditor of the estate of Arthur Victor Clayton (hereinafter called "the "intestate") and the defendants were the administrators, namely, Mrs. Jane Elizabeth Clayton, the intestate's widow, and Wilfred Albert Reade (hereinafter together called "the defendants"). They had acted also as solicitors for the defendants as vendors on a sale of part of the property comprised in the estate, the proceeds of sale being

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(1) 64 L. T. 706, 708 *fin.* The passage here referred to is: "I "apprehend, . . . . that the distinction between a solicitor's "lien upon money recovered by "him . . . . . and upon deeds, "is perfectly well settled. He has "a general lien upon deeds and "papers in his hands for all costs, "however arising. But he has no "such general right of lien against "moneys which he recovers for his "client. Whether he gets them or "does not, his lien or right to be "paid out of those funds is to be "confined to the costs incurred in "respect of those funds, subject, "of course, only to this, that he "has the ordinary rights of set-off "which one creditor has as against "another, and which I need not "further refer to. That distinction is pointed out by Lord "Cottenham in the case of *Bozon* "v. *Bolland* (4 My. & Cr. 354), "and must not be lost sight of."

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paid into Court. There was paid into Court money, being the deposit on the sale, and also the balance of the purchase money after paying off mortgagees. At the date of this summons the funds in Court consisted of cash representing interest on War Loan, money on deposit, and War Loan. There was a stop in favour of the Inland Revenue for income tax.

At the date of the hearing of this summons, the applicants had had no costs paid to them in the administration action. By this summons, taken out on February 15, 1940, they asked that, despite the stop, (1.) it might be declared that they were entitled, as the defendants' solicitors in the action, to a charge on the funds in Court, as property "recovered or preserved" in the action through their instrumentality, for the amount of their costs, charges and expenses of or in reference to the action; (2.) it might be referred to the Taxing Master to tax those costs, charges and expenses as between solicitor and client, including therein the applicants' costs, charges and expenses of and in reference to the action, and their costs of and incidental to this application; (3.) the amount of those taxed costs, charges and expenses might be raised and paid to the applicants out of the money on deposit forming part of the funds in Court, and in case of insufficiency out of the cash forming part thereof, and in case of insufficiency by sale of the War Loan forming part thereof, or a competent part of it; (4.) until payment the funds in Court should stand charged as aforesaid.

The Master made an order in Chambers as asked by the summons, but limiting the costs, charges and expenses for which the applicants were to be entitled to a charge to those of recovering and preserving the property, and the order was subject to the stop in favour of the Inland Revenue. The applicants asked for the summons to be adjourned to the judge and it was adjourned into Court as a procedure summons, the respondents being the Commissioners of Inland Revenue and the plaintiff in the administration action.

The facts are fully stated in his Lordship's judgment.

*G. G. Solomon* for the applicants referred to *Gilbert* v.

*Gilbert and Boucher.* (1) The Court has a discretion as to whether it shall or shall not declare a solicitor entitled to a charge. The Solicitors Act, 1860, and the Solicitors Act, 1932, say only that the Court "may" so declare: and the applicants wish to persuade the Court that this is a proper case for the exercise of its discretion. In *Charlton* v. *Charlton* (2) the solicitors got a full charging order. [He referred to s. 28 of the Solicitors Act, 1860 (3); *In re John Clayton, Ld.* (4); the note on p. 2371 of the Annual Practice, 1940, beginning "Charging order for costs "on property 'recovered or preserved'"; *Mackenzie* v. *Mackintosh* (5); and *Waterland* v. *Serle.* (6)]

The authorities show that there has never been refusal to exercise the discretion except for good reasons: *In re Turner* (7); *In re Cockrell's estate.* (8)

*J. H. Stamp* for the Commissioners of Inland Revenue. The proper order is the one made by the Master, limiting the charge to the costs incurred on litigation for recovery of the assets. The cases cited on behalf of the applicants are cases in which, substantially, the solicitors had the costs of the action. [He referred to *Greer* v. *Young* (1); *Emden* v. *Carte* (2); *Turnbull* v. *Richardson* (3); *Mackenzie* v. *Mackintosh* (4); and *Scholey* v. *Peck.* (5)]

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(1) [1928] P. 1, 8.

(2) (1883) 49 L. T. 267.

(3) Sect. 28: "In every case "in which an attorney or solicitor "shall be employed to prosecute "or defend any suit, matter, or "proceeding in any court of "justice, it shall be lawful for the "Court or judge before whom any "such suit, matter, or proceeding "has been heard, or shall be pending, "to declare such attorney or "solicitor entitled to a charge "upon the property recovered or "preserved; and upon such declaration "being made such attorney "or solicitor shall have a "charge upon and against and a "right to payment out of the "property, . . . . which shall "have been recovered or preserved "through the instrumentality of "any such attorney or solicitor, "for the taxed costs, charges, and "expenses of or in reference to "such suit, matter, or proceeding; "and it shall be lawful for such "Court or judge to make such "order or orders for taxation of "and for raising and payment of "such costs, charges, and expenses "out of the said property as to "such Court or judge shall appear "just and proper; and all conveyances "and acts done to "defeat, or which shall operate to "defeat, such charge or right, "shall, unless made to a bona fide "purchaser for value without "notice, be absolutely void and of "no effect as against such charge "or right: . . . ."

(4) (1905) 92 L. T. 223.

(5) (1891) 64 L. T. 706.

(6) [1897] W. N. 163.

(7) [1907] 2 Ch. 126, 539.

(8) [1911] 2 Ch. 318.

*J. F. Bowyer* for the plaintiff in the administration action adopted the last argument. The plaintiff is the person who has the conduct of the action, and it would be grossly unfair to her and to her solicitors if the charging order were extended in the way in which the applicants ask that it should be extended.

*G. G. Solomon* in reply referred to *Greer* v. *Young* (1) and *In re Knight.* (6)

MORTON J. Arthur Victor Clayton died intestate on November 28, 1933, and on January 16, 1934, letters of administration were issued to the defendants, Jane Elizabeth Clayton and Wilfred Albert Reade. The intestate was a builder and estate agent and he owned a number of properties. There were no fewer than fifty mortgages subsisting on these properties at the time of his death. On June 26, 1935, the plaintiff in this action, Mrs. Collins, issued an originating summons for administration of the estate, she being a creditor of the intestate, and on October 25, 1935, an order for administration was made.

The applicants on the summons which is before me, Messrs. Savage, Cooper and Wright, solicitors, acted throughout the proceedings for the defendants, the administrators of the estate. One of the properties which were the subject of mortgages was a property called "Oakdene," and with regard to "Oakdene" a conditional contract was entered into by the defendants on December 18, 1935, for the sale thereof for 2650*l.* By an order of January 29, 1936, that contract, with a certain immaterial variation, was ordered to be carried into effect. It was ordered that the defendant Jane Elizabeth Clayton and Messrs. Savage, Cooper and Wright should respectively lodge in Court as directed in the schedule to the order certain deposits received by them, the facts being that Mrs. Clayton had received 50*l.*, part of the deposit and Messrs. Savage, Cooper and Wright had received 215*l.*, the balance thereof. It was further ordered "that the defendants be at liberty to receive "the balance of the purchase money payable upon the completion of the said sale, and after payment thereout to the "said Halifax Building Society of the amount due to such "society in discharge of principal, interest, costs and other "moneys secured by a mortgage dated March 24, 1930, and "made between the above-named intestate of the one part "and the said Halifax Building Society of the other part and "being a first charge upon the property described in the said "conditional contract and do lodge in Court to the credit of "this action"—then the heading of the account was given—"the said balance of purchase money." The sale was duly carried out in March, 1936. The applicants on the present application acted as solicitors for the vendors, as is said in para. 11 of Mr. Wright's affidavit, having procured the mortgagees to consent to the sale. The sale having taken place, the two sums of 50*l.* and 215*l.* (making together the deposit of 265*l.*) and also a sum of 756*l.* 5*s.* 1*d.*, the balance of the purchase money after discharging the sums due to the mortgagees, were on March 18, 1936, paid into Court to the credit of the account. The funds in Court now standing to this credit are: cash 18*l.* 11*s.*, which I understand represents certain interest accrued on War Loan, 265*l.* money on deposit, and 812*l.* 16*s.* 5*d.*, 3½ per cent. War Loan.

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(1) (1883) 24 Ch. D. 545.
(2) (1881) 19 Ch. D. 311.
(3) (1884) 1 Times L. R. 244.
(4) 64 L. T. 706.
(5) [1893] 1 Ch. 709.
(6) [1892] 2 Ch. 368.

There is a stop in favour of the Inland Revenue for income tax. The applicants have so far had no costs paid to them in the action, which has not yet proceeded to further consideration, and, if they had to look to their clients personally for their costs, according to the evidence before me they would be unlikely to obtain payment. In those circumstances the applicants ask that it may be declared that the applicants are entitled to a charge on the funds in Court, as being property recovered or preserved in this action through the applicants' instrumentality for the amount of the taxed costs, charges and expenses of the applicants of or in reference to this action as the solicitors of the defendants in this action down to and including the order to be made on this application. It will be observed that the claim for a charge is not limited to the costs properly incurred in recovering or preserving the property, that is, the funds in Court, but extends to the whole of the applicants' costs in the action, down to and including the present date.

Sect. 69 of the Solicitors Act, 1932, provides: "Any court "in which a solicitor has been employed to prosecute or defend "any suit, matter or proceeding may at any time"—it is to be observed the jurisdiction is discretionary—"declare the "solicitor entitled to a charge on the property recovered or "preserved through his instrumentality for his taxed costs in "reference to that suit, matter or proceeding, and may make "such orders for the taxation of the said costs and for raising "money to pay, or for paying, the said costs out of the said "property as they think fit, and all conveyances and acts done "to defeat, or operating to defeat that charge shall, except in "the case of a conveyance to a bona fide purchaser for value "without notice, be void as against the solicitor: . . . ." Then there is a proviso which is immaterial to the present case. That section differs somewhat in its wording from s. 28 of the Solicitors Act, 1860, and in particular, instead of the words "in reference to that suit, matter or proceeding" s. 28 of the Solicitors Act, 1860, has the words "of or in reference to such "suit, matter or proceeding." Mr. Solomon, for the applicants, contends, and it has not been disputed in argument, that the words used in the two sections have the same effect, so far as the question before me is concerned.

Mr. Solomon submits, first of all, that there is jurisdiction under the section to make the order for which he asks. That I do not doubt. I think that there is jurisdiction to make the order if the Court thinks fit, and to that extent I do not think that the note on page 2371 of the Annual Practice, 1940, under the heading "Extent of" is quite accurate. That note is: "This statutory power given to the Court in aid of the "common law right"—then a case is referred to of *In re Born* (1)

(1) [1900] 2 Ch. 433.

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—"is confined to the costs, charges and expenses incurred "in respect of the particular property 'recovered or preserved,' ". . . . : it is not a general charge for all costs." I think that the statutory power in fact extends more widely than is stated there, and indeed the contrary was not contended by Mr. Stamp and Mr. Bowyer for the respondents to this application. They conceded that the power extends to the whole costs of the solicitor in reference to the whole of the action, but argued that the order ought to be limited, as a matter of principle, to the costs properly incurred in recovering and preserving the property. Mr. Stamp has referred me to *Greer* v. *Young* (1), and in particular to the observation of Chitty J. : "A "point to which I called counsel's attention was that the "order had not been so drawn as to limit, as it ought "to have done, the costs of the solicitor to his costs "properly incurred in recovering and preserving the property." Mr. Stamp also relied on the observations of Sir William Baliol Brett M.R. (2) : "I do not adopt the idea of salvage as an "accurate analogy in all respects, but I think the fundamental "theory is, that what is recovered by the action of the solicitor "is to be treated as if he had earned salvage, and that he is "to be paid for his services on the theory that salvage services "have been rendered." Similarly Bowen L.J. said (3) : "It "appears clear to me that it is a salvage section." (That is the section in the 1860 Act to which I have referred.) "The "solicitor is treated as a salvor who has recovered or preserved "something in a time of danger by his work and labour. Into "whatever hands it may fall it is charged with the salvage." These passages seem to me to show quite clearly that the principle upon which the Court proceeds is that the solicitor is to be rewarded for his efforts to the extent of receiving the costs, charges and expenses properly incurred in recovering or preserving the property. Mr. Stamp referred me also to *Emden* v. *Carte* (4); *Turnbull* v. *Richardson* (5) ; and *Scholey* v. *Peck* (3), as supporting the argument which he put before me.

(1) 24 Ch. D. 545, 549.
(2) Ibid. 552.
(3) Ibid. 556.
(4) 19 Ch. D. 311.
(5) 1 Times L. R. 244.
(6) [1893] 1 Ch. 709.

I agree that they do support that argument, and I propose to make an order in accordance with the submission that has been put before me by counsel for the respondents.

With regard to *Charlton* v. *Charlton* (1); *In re John Clayton, Ld.* (2); and *In re Knight* (3), cited by Mr. Solomon, I think that in those cases there were circumstances which explain why the Court made an order covering all the costs incurred in the action. I do not propose to examine these cases in detail, but I think that they are clearly distinguishable from the present case. In the present case the solicitors are acting only for the defendants. They are no doubt justly entitled to a charge for their costs on this fund in Court, to the extent to which these costs have been incurred in recovering and preserving the fund. I see no reason for departing from what I conceive to be the general principle and giving them any wider charge than that.

I may add that, to my mind, the three cases referred to on page 2371 of the Annual Practice, 1940, do not establish the broad statement for which they are quoted as authority, and I think that the note in the Annual Practice is based upon a passage in the judgment of Lindley L.J. in *Mackenzie* v. *Mackintosh.* (4) I do not think that that passage, when read in its context, establishes what is said in the note.

For these reasons, I propose to limit the declaration to be made on paragraph (1.) of the summons to the costs, charges and expenses properly incurred in recovering or preserving the fund in Court. I should have added that I do not propose to give that charge priority over the stop order which has been imposed in favour of the Inland Revenue. I do not express any view on that matter, as it has not been fully argued. It is a purely academic point, as it is quite obvious that the fund in Court will be ample to meet the costs in question without trespassing on the Crown's claims.

I think that the proper order in this case is to make the costs of the plaintiff and of the Crown costs in the cause, and I shall also make the applicants' costs, exclusive of the adjournment into Court, costs in the cause. I shall make no order as to the applicants' costs of the adjournment into Court. I think that in this case it is only right that there should be an order in the terms of para. (3.) of the summons, that "the amount of such taxed costs, charges and expenses may be raised and paid "to the applicants out of the money on deposit . . . . and "in case of insufficiency then . . . . by sale of the 3½ per cent. "War Loan." There is 265*l.* on deposit.

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(1) 49 L. T. 267.

(2) 92 L. T. 223.

(3) [1892] 2 Ch. 368.

(4) 64 L. T. 706, 708 *fin.*

Solicitors: *Savage Cooper & Wright; Solicitor of Inland Revenue; Forsyte, Kerman & Phillips.*

K. R. A. H.

# *In re* COOTE.

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## CAVERS AND EVANS *v.* KAYE AND OTHERS.

[1939. C. 3077.]

*Will—Settlement—Mansion house—Heirlooms—To be held and enjoyed by person for time being "actually entitled" to mansion house—Not to vest absolutely in tenant in tail by purchase under settlement unless attaining twenty-one or dying leaving issue—Death of first tenant in tail by purchase over twenty-one but predeceasing life interests—"Actually entitled" to mansion house—"Entitled" and "possession"—Tenant in tail by purchase absolutely entitled to heirlooms.*

A settlement by will of a mansion house and of heirlooms to be held and enjoyed by the person for the time being "actually "entitled" under the settlement to the mansion house provided that the heirlooms should not vest absolutely in any person thereby made tenant in tail by purchase of the mansion house unless attaining the age of twenty-one years or, if dying under that age, leaving lawful issue living.

The first tenant in tail by purchase, at the age of twenty-one years and without having been married, in 1918 predeceased an uncle and his own father, both of whom had prior life interests. The uncle died in 1925 and the father in 1938.

On a summons to determine (inter alia) whether the heirlooms were held on trust for his personal representatives :—

*Held*, that he was entitled to the heirlooms, as he was the first tenant in tail by purchase and attained the age of twenty-one years, and as it was not clear from the use of the words "actually "entitled" that the testator intended to make the ownership of the heirlooms dependent on the tenant in tail coming into actual possession of the mansion house. That followed from the rule, well settled by the date of *Foley* v. *Burnell* (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319; re-stated by Page Wood V.-C. in *Lord Scarsdale* v. *Curzon* (1860) 1 J. & H. 40; and stated again in *In re Parker* [1910] 1 Ch. 581, 584, 585, by Parker J. in terms later approved by the House of Lords in *Portman* v. *Portman* [1922] 2 A. C. 473, as being that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for an estate of inheritance, whether in possession or in remainder, becomes absolutely entitled to the chattels, subject, if his estate is in remainder, to all prior limited interests, and that words intended to defeat the interest of a tenant in tail who does not come into actual possession of the property must be reasonably clear and certain.

*In re Angerstein* [1895] 2 Ch. 883; *In re Fothergill's Estate* [1903] 1 Ch. 149; *In re Lord Chesham's Settlement* [1909] 2 Ch. 329; and *In re Lewis* [1918] 2 Ch. 308, considered.

ADJOURNED SUMMONS.

Charles Gartside Eyre Coote (hereinafter mostly called "Charles"), was the first tenant in tail by purchase under a settlement contained in the will dated June 18, 1857, of Eyre Coote (hereinafter called "the testator") of a mansion house called West Park. Charles was the first child of the testator's second son. The settlement also comprised heirlooms, to be "held and enjoyed by the person who shall for "the time being be actually entitled" to the mansion house "yet so that the same shall not vest absolutely in any person "hereby made tenant in tail by purchase" of the mansion house "unless such person shall attain the age of 21 years, "or dying under that age shall leave lawful issue living at his "or her death. . . . ."

At the age of twenty-one years and without having been married, Charles died on March 22, 1918. He predeceased an uncle, who was the testator's eldest son, and his own father, to both of whose life interests his own interest as tenant in tail was subject. The uncle died without issue in 1925 and the father in 1938. This summons was taken out by the trustees of the testator's will, on September 28, 1939, to determine on what trusts the heirlooms were held. The other parties were Mrs. Evelyn Gertrude Eyre Kaye, the testator's deceased second son's second child; John Aubrey Coote Sykes, the elder of the two infant children of the second son's deceased third child; two of Charles' personal representatives; and defendants representing the testator's next of kin. After the death of Charles' father in 1938, Mrs. Kaye became entitled to one half of West Park as tenant in tail by purchase, and John Aubrey Coote Sykes to the other half as tenant in tail by descent.

The summons asked (inter alia) whether the heirlooms were held on trust (*a*) as to one half for Mrs. Kaye and as to the other for John Aubrey Coote Sykes, (*b*) as to the whole for Charles' personal representatives, or (*c*) as to the whole as part of the testator's residuary personalty, or on what other trusts.

The facts are fully stated in his lordship's judgment.

*Andrewes Uthwatt* for the trustees.

*E. J. T. G. Bagshawe* for Mrs. Kaye. In order for Mrs. Kaye's claim to succeed, it must be shown that Charles' personal representatives have no claim, and, to do that, reliance must be placed on certain authorities. [He referred to *Lord Scarsdale* v. *Curzon* (1); *In re Angerstein* (2); *In re Fothergill's Estate* (3); *In re Lord Chesham's Settlement* (4); and *In re Parker*. (5)] On those authorities this is not a case where the first tenant in tail can take an absolute interest, and Charles' personal representatives have no claim here. The infant defendant cannot take the heirlooms because he is a tenant in tail by descent and not by purchase. The gift here is to tenants in tail by purchase. It is not objectionable on the ground of remoteness or perpetuity. [He referred to *Christie* v. *Gosling*. (6)]

*G. A. Rink* for John Aubrey Coote Sykes. John became entitled to half the heirlooms on the basis that, on the death of the last tenant for life, he and Mrs. Kaye were "actually "entitled" to the mansion house together. In the cases the words "actual possession," rather than the words "actually "entitled," have been used. A distinction is made between "possession" and "actual possession," and one should likewise be made between "entitled" and "actually entitled." "Actually" must refer to a person with a present title. See Coke on Littleton, vol. ii., p. 266 (*b*), and note by Butler, s. 448.

[He referred to Vaizey on Settlements, p. 1349; *Lord Scarsdale* v. *Curzon* (1); *In re Lord Chesham's Settlement* (4); *In re Lewis* (7) and *Portman* v. *Portman*. (8)] *Christie* v.

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(1) 1 J. & H. 40.
(2) [1895] 2 Ch. 883.
(3) [1903] 1 Ch. 149.
(4) [1909] 2 Ch. 329.
(5) [1910] 1 Ch. 581.
(6) (1866) L. R. 1 H. L. 279.
(7) [1918] 2 Ch. 308.
(8) [1922] 2 A. C. 473.

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*Gosling* (1) does not apply to a clause in this form: cf. *Countess of Harrington* v. *Earl of Harrington.* (2)

*H. A. Rose* for the testator's eldest son's widow.

*E. J. Heckscher* for Charles' personal representatives, referred to *In re Parker.* (3) For the heirlooms to be taken away from the personal representatives, there must be reasonable certainty that Charles was excluded. [He referred to *Portman* v. *Portman* (4) and *In re Duncombe.* (5) The word "actually" is otiose and merely doubtful. It cannot bring the case within *Lord Scarsdale* v. *Curzon.* (6)

*George A. Russo* for the next of kin, supported the arguments for Mrs. Kaye and John Aubrey Coote Sykes as against Charles. If Charles' personal representatives do not take, no one can take.

[MORTON J. On consideration, I feel that this is a *Foley* v. *Burnell* (7) case, and not a *Lord Scarsdale* v. *Curzon* (6) case. The words are not clear enough to displace the ordinary rule.]

My arguments that the heirlooms fall into residue all depend on this not being a *Foley* v. *Burnell* (7) case, and on the proposition that Charles could not take unless he survived his father. Therefore it would not be right to put these arguments before the Court.

MORTON J. By his will dated June 18, 1857, Eyre Coote (whom I shall call "the testator") devised ". . . . my . . . . "mansion house called West Park with the . . . . appur-"tenances thereunto belonging and all my freehold . . . . "real estate . . . . as well in England as in Ireland . . . ." (subject to a rentcharge of 500*l.* therein mentioned) ". . . . "unto Richard Steele Hawkesworth, . . . . George Staunton "Massey Dawson . . . . Robert Poore . . . . and Philip "Augustus Hanrott to the use of my eldest son and his assigns "for his life without impeachment of waste (except voluntary "waste in pulling down houses or buildings and not rebuilding "the same or others of equal or greater value) and from

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(1) L. R. 1 H. L. 279.

(2) (1871) L. R. 5 H. L. 87.

(3) [1910] 1 Ch. 581.

(4) [1922] 2 A. C. 473.

(5) [1932] 1 Ch. 622, 631, 640.

(6) 1 J. & H. 40.

(7) 1 Bro. C. C. 274; 4 Bro. P.C. 319.

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"and immediately after the decease of my said son to the use "of his first and other sons successively according to their "respective seniorities in tail male and in default of such issue "to the same or the like uses in favour of my second and other "sons successively according to their respective seniorities "and their first and other sons successively in tail male re"spectively And in default of such issue to the use of the "first and other sons of my oldest son successively according "to their respective seniorities in tail And in default of "such issue to the use of the daughter or daughters of my "oldest son in tail if more than one as tenants in common "with cross remainders in tail and in default of such issue to "the same or the like uses in favor of the first and other sons and "the daughter or daughters of my second and other sons "successively according to seniority and in default of such "issue to the use of my eldest daughter and her assigns for her "life without impeachment of waste (except as aforesaid)." I can pause there in view of the events which have happened. I pass over large portions of the will, although I may have to refer to them briefly for another purpose, and come to a provision which appears on page 28 of my copy of the will: "I "give and bequeath unto"—then he names the trustees again—"their executors administrators and assigns all my "plate and plated articles glass china pictures prints statues "bronzes article of virtu books household furniture and effects "goods and chattels (except wines and liquors and other "consumable articles) which shall be my property in or about "or belonging to or ordered for my said capital Mansion House "called West Park aforesaid and also all my family jewels "swords armour and arms firearms and all articles presented "to me or any of my ancestors"—now come the vital words in the will—"Upon trust to permit the same to go and be held "and enjoyed by the person who shall for the time being be "actually entitled to my said Mansion House under the said "limitations of this my will as or in the nature of heirlooms "yet so that the same shall not vest absolutely in any person "hereby made tenant in tail by purchase of my said Mansion "House unless such person shall attain the age of twenty-one "years or dying under that age shall leave lawful issue living "at his or her death yet nevertheless such tenant shall during "his or her respective minority be entitled to the use and "enjoyment of all the said chattels and effects." Then follows a provision as to inventories, which is material only because it refers to the inventories being signed by the "person or persons" for the time being entitled to the use and enjoyment of the chattels and effects—thus indicating that the testator contemplated that more than one person might be entitled for the time being to the use and enjoyment of the chattels. Then the testator gave his moneys, securities for money and the rest and remainder of his personal estate and effects whatsoever and wheresoever unto the trustees, their executors, administrators and assigns "upon trust for "the persons to whom and in the shares and proportions in "which the same would be distributed under the statute for "the distribution of the personal estate and effects of persons "who have died intestate."

The events which happened were these. The testator died on August 23, 1864, having made a codicil to his will which is immaterial for the present purpose. He had four children: first, Eyre Coote, who died without issue on May 6, 1925; secondly, Charles Henry Eyre Coote, who died on November 23, 1938; thirdly, a son who died an infant in 1876; and, fourthly, the defendant, Lady Northbrook: thus the successive tenants for life under the will of West Park were, first, the testator's eldest son, Eyre Coote; secondly, the second son, Charles Henry Eyre Coote. Charles Henry Eyre Coote had three children; the first child was Charles Gartside Eyre Coote, to whom for brevity I shall refer as "Charles." He was born on December 2, 1896, and died unmarried on March 22, 1918. He was thus the first tenant in tail by purchase under the provisions of the will and he did attain the age of twenty-one years, but he did not come into actual possession (to use a phrase which appears in many of the cases) of West Park because at the time of his death his interest as tenant in tail was subject to the life interests of his uncle and his father. The second child of Charles Henry Eyre Coote was the defendant Mrs. Evelyn Gertrude Eyre Kaye. She is of age. The third child of Charles Henry Eyre Coote was Nina Violet Eyre Sykes, who was married in 1931 and died in 1935, leaving her surviving two children of whom the elder was the defendant John Aubrey Coote Sykes, an infant. When Charles' father died in 1938 the persons who became entitled to West Park (subject to a statutory trust for sale which is imposed by s. 36 of the Settled Land Act, 1925, and subject to certain rentcharge) were as follows: as to one half Mrs. Kaye became entitled as tenant in tail by purchase and as to the other half John Sykes (as I shall call him) became entitled as tenant in tail by descent and there were cross remainders in tail.

In those circumstances the question which I have to decide is, who became entitled to the heirlooms on the death of Charles' father in 1938? There are four claimants. In the first place Mr. Bagshawe, who appears for the defendant Mrs. Kaye, says that, on the death of Charles Henry Eyre Coote, she became the only person who answered the description of " the person who shall for the time being be actually entitled "to my said Mansion House under the said limitations of this "my will." He contends that Charles was cut out from this gift by reason of the fact that he did not survive his father. The words " actually entitled," he submits, mean entitled to the actual possession of the Mansion House. He endeavours to dispose of the claims of John Sykes by saying that, as is the fact, he is not a tenant in tail by purchase and by contending that on this ground he does not answer the above description. The second contention is that of Mr. Rink, for John Sykes, who says that Mrs. Kaye and John Sykes both answer the above description and are entitled to the chattels in equal shares. The third contention is that of Mr. Heckscher, who says that the chattels vested in Charles on his birth and that, as he attained the age of twenty-one years, his interest in them was never divested. Lastly, Mr. Russo, for the last two defendants, who represent the testator's next of kin, submits that the chattels are not effectively disposed of by the bequest in question and fall into residue.

I think that the first question I have to consider is: was

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Charles cut out of the gift by reason of the fact that he failed to survive his father and come into the actual possession of West Park? In dealing with this question I must bear in mind a rule which was settled at least as long ago as the date on which *Foley* v. *Burnell* (1) was decided. That rule was in full force when the testator died in 1864 and had been restated in 1860 by Page Wood V.-C. (as he then was) in *Lord Scarsdale* v. *Curzon*. (2) It was again stated by Parker J. (as he then was) in *In re Parker* (3) in the following terms: "It is, in my opinion, clear, both on principle and on authority, "that, where chattels are simply directed to pass as heirlooms "with real estate, the first person who under the limitations "of the settlement becomes entitled to the real estate for a "vested estate of inheritance, whether in possession or "remainder, becomes absolutely entitled to the chattels, "subject, of course, to his interest being defeated by any "event which would defeat his estate in the realty, and, if "such estate is in remainder, subject to all prior limited interests "such as interests for life. This rule is thought to give effect, "and does, in my opinion, give effect, to the testator's expressed "intention as nearly as the nature of the property admits, it "being impossible wholly to effectuate such intention, because "the law does not allow the creation of estates or heritable "interests in personal property, and has rules against perpet"uities. A settlor may, of course, use words shewing an "intention to modify the rule, but the words relied on for this "purpose must indicate such intention with reasonable "certainty. Thus it is possible to introduce a provision "defeating the interest of a tenant in tail by purchase who "dies under the age of twenty-one years, but such a provision "will not be implied merely by a direction that the real estate "and chattels shall go together as long as the rules of law and "equity permit. There must be an express provision to that "effect. Similarly it is possible to introduce provisions defeating "the interest of a tenant in tail who does not come into actual "possession of the property; but words which are to have

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

(2) 1 J. & H. 40.

(3) [1910] 1 Ch. 581, 584, 585.

"this effect must be reasonably clear and certain. Further, in "considering whether the testator has manifested an intention "contrary to the ordinary rule, the Court ought not to be "influenced by the actual events which have occured. If the "real estate be settled on a father for life, with remainder to "his first son in tail, and a son is born and dies in early infancy, "probably a settlor would say that it would not effectuate "his intention to give the son an absolute interest in the heir-"looms which the father would take as his administrator; "but this would be no reason why the Court should lay hold "of doubtful expressions and infer therefrom an intention to "defeat the son's interest unless he came into actual possession, "for had the son attained twenty-one and joined with his "father in resettling the realty, it is equally probable that the "settlor would have said that his intention could only be "effectuated by a resettlement of the heirlooms, which would "be impossible unless the son had a vested interest, although he "had not become entitled to actual possession of the realty. "Indeed, it is precisely for this reason that, in the opinion of "conveyancers, provisions defeating the interest of a tenant in "tail unless he comes into possession are undesirable." The rule which I have just quoted was referred to with approval by Viscount Birkenhead L.C., in *Portman* v. *Portman.* (1)

I must therefore bear in mind this rule in construing the testator's will. As a matter of first impression, and apart altogether from the rule, I might possibly have arrived at a different conclusion from the conclusion which I am about to state. I do not know. But I must approach the clause before me with this in mind, that, in the absence of clear words to the contrary, Charles would become entitled to those chattels on his birth, and absolutely. There are clear words excluding him in the event of his not attaining the age of twenty-one years, but are there words (to use Parker J.'s language) which make it " reasonably clear and certain " that Charles is excluded if he fails to come into actual possession of West Park ?

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(1) [1922] 2 A. C. 473, 485.

What is the effect in this will of the phrase "actually "entitled to my said Mansion House under the said limitations "of this my will"? Mr. Bagshawe, in his very helpful argument, referred me to a number of cases. In the first place he referred to *Lord Scarsdale* v. *Curzon* (1) which I have already mentioned. In that case the relevant words were "in trust for the person or persons who for the time being shall, "by virtue of the limitations hereinbefore expressed and "contained, be seised of or entitled to the actual freehold of the "said capital messuage or mansion-house." It is important to note that in that case the phrase "actual freehold" was use in other parts of the will in such a sense that the Vice-Chancellor said: ". . . . but I think it impossible to give "to the words 'the person seised of or entitled to the actual "'freehold' any other meaning than the person in possession. "I am far from saying that the words 'actual freehold' have "any such technical sense; nor do I rest my opinion on the "phraseology pointed out in some passages of Coke upon "Littleton; but, on the whole of this settlement, I have no "doubt about the meaning of these words. It is not necessary "to go through all the clauses which have led me to this "conclusion, but I may mention, by way of example, the "powers of jointuring given to children, 'whether they shall or "'shall not be in possession, or entitled to the actual freehold.' "There you cannot deprive the word 'actual' of all special "significance without making nonsense of the clause, because "there could be no children who would not be entitled to the "freehold simpliciter, either in possession or remainder. "'Actual,' therefore, must mean in possession, or the clause "would have no meaning. That is the strongest instance; but "there are numerous examples of the same kind." Then he gives other examples. Thus, on the wording of the will which the Vice-Chancellor had to consider, he felt that he could conclude only that, when the words "actual freehold" were used, they signified freehold in actual possession.

Contrasting that case with the case before me, I find that although the word "possession" does not appear at all in the clause which I have to construe, yet, in other parts of the will, the testator over and over again uses the words "actual "possession": so that he was perfectly familiar with the phrase, and, if he had wanted to make the interest of the tenant in tail dependent upon his coming into actual possession, there would have been no difficulty in saying "who shall for "the time being be entitled to the actual possession of my said "Mansion House." Instead of that he has used the words "actually entitled," and for my part I find great difficulty in giving any different meaning to "actually entitled" than that which I give to the word "entitled." If the testator had "made his own dictionary," as he did in *Lord Scarsdale* v. *Curzon* (1), the words might well be given the significance for which Mr. Bagshawe and Mr. Rink contend; but, in my view, in this will they remain words of doubtful significance and I cannot find that they are reasonably clear and certain. I have some suspicion that the testator may have intended the words "actually entitled" to refer to actual possession, but I do not feel at all convinced on the point.

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(1) 1 J. & H. 40, 66.

The next case to which Mr. Bagshawe referred was *In re Angerstein.* (2) In that case there were two contrasted clauses, one being "shall . . . . be entitled to the "actual possession of my said freehold estates in the county "of Norfolk" and the other being "entitled in possession to "my said freehold mansion-house." Kekewich J. thought that the introduction of the word "actual" made a large and important difference. In the case of the former of those clauses he held that actual possession was essential and in the case of the latter clause he held that it was not. Again, in *In re Fothergill's Estate* (3) Swinfen Eady J. (as he then was) had to consider two contrasted clauses, one being "in the "actual possession or entitled to the receipt of the rents and "profits" of certain real estates, and the other being "entitled "to the possession or receipt of the rents" of the settled estates. Swinfen Eady J. drew a distinction between those two clauses and held that one referred to actual possession

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(1) 1 J. & H. 40.
(2) [1895] 2 Ch. 883.
(3) [1903] 1 Ch. 149.

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and that the other did not. It is to be observed that in each clause, in each of these two cases, there is a reference to "possession." Mr. Bagshawe then referred to *In re Lord Chesham's Settlement* (1), which can perhaps be described as the high-water mark of the decisions to the effect that actual possession is essential. There the headnote says: "By a "settlement of real estates made in 1877, plate, pictures, and "chattels were assigned to trustees 'upon trust to permit the "'same to be used, held, and enjoyed with the mansion house "'aforesaid by the person who for the time being shall be "'entitled to the said mansion house under the limitations "'thereof herein contained,' yet so that for the effect of "transmission they should not vest absolutely in any person "thereby made tenant in tail male by purchase who should "not attain the age of twenty-one years." It was held by the Court of Appeal that the chattels did not vest absolutely in a tenant in tail who attained the age of twenty-one but predeceased the tenant for life. That case has never been overruled, but it was referred to in *Portman* v. *Portman* (2) by Viscount Birkenhead L.C. in the following terms: "It is "clear from the judgments that the Court of Appeal was "influenced by former decisions, though these were not "binding upon them. The only question was whether the "Court was satisfied that it was intended that no person should "take unless he became tenant in tail in possession of the "settled estate. The Court was so satisfied on the ground "that the words 'with the mansion house' were an essential "part of the trust, and unless the tenant in tail were in actual "possession the enjoyment of the chattels might be divorced "from the enjoyment of the mansion house, whereas the "chattels were only to be enjoyed with the house. I am "satisfied that the Court considered that the trust was an "application of the fourth rule in *Lord Scarsdale* v. *Curzon* (3) "and that there is nothing in the decision which throws "doubt upon the principles laid down in the earlier cases. "The decision has been criticised and commented upon in *In*

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(1) [1909] 2 Ch. 329.

(2) [1922] 2 A. C. 473, 487.

(3) 1 J. & H. 40, 50.

"*re Beresford-Hope* (1); *In re Fowler* (2) and *In re Lewis* (3) "and it may, without excessive irony, be said that it has been "distinguished with more zest than it has been followed. I "agree with Warrington L.J., that it is 'very difficult to "'reconcile the decision with *Foley* v. *Burnell'* (4), and I find "it proper to add that the force attributed to the verbs used, "and in particular to the word 'enjoyed,' goes beyond the "decision in any other case, whether earlier or later. The "words used in the bequests of Colonel Harcourt, to which I "now turn my attention, are, however, not such as render it "necessary to consider whether in (*sic*) *In re Lord Chesham's* "*Settlement* (5) was rightly decided or should be overruled; "*In re Parker* (6) was nearer to *Chesham's* case (5) than "the present appeal, and there Parker J. distinguished "it and in my opinion he was right in so doing. I do not "myself regard *Chesham's* case (5) as being more than a "particular application of the principles governing this class "of cases or as having laid down any principle or exception of "general application." I think it is clear from that passage that although the case of *In re Lord Chesham's Settlement* (5) has never been overruled, the decision was not regarded by Viscount Birkenhead with any great favour. In view of his observations I think I am bound to apply to the best of my ability the rule stated by Parker J. in *In re Parker* (6) and approved by the House of Lords in *Portman* v. *Portman* (7), without allowing myself to rest my decision on such resemblance as exists between the words used in the will before me and the words used in the will which was construed in the *Chesham* case. (5)

The next case cited by Mr. Bagshawe was *In re Parker* (6) to which I have already referred for the statement of the general rule. In that case the words were "shall be considered "as or in the nature of heirlooms, and shall pass with my "said house in the same manner as if they were land or other "real property appendant or appurtenant thereto, and shall

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(1) [1917] 1 Ch. 287.
(2) [1917] 2 Ch. 307.
(3) [1918] 2 Ch. 308.
(4) 4 Bro. P. C. 319.
(5) [1909] 2 Ch. 329.
(6) [1910] 1 Ch. 581.
(7) [1922] 2 A.C. 473, 487.

"accordingly continue annexed to my said mansion house so "long as the law will permit, and be inherited or enjoyed by the "several persons who shall succeed to my said mansion house "under or by virtue of the limitations in my said will and "hereinbefore contained respecting the same, and be subject "to the rules of law or equity applicable thereto, and in no "wise pass under or by any bequest of my personal or residuary "estates or effects, but subject nevertheless to reasonable "wear and deterioration by use." In that case, notwithstanding the words "shall accordingly continue annexed to my said "mansion house . . . . and be inherited or enjoyed by the "several persons who shall succeed to my said mansion house," Parker J. held that a son who had died in the lifetime of the tenant for life took the chattels. Lastly, Mr. Rink referred me to *In re Lewis* (1), in which the words were "upon trust to "permit the same from time to time to go and be held and "enjoyed with the said mansion house so far as the rules of law "and equity will permit by the person or persons who for the time "being shall be entitled to the possession of my real estates." This was followed by a clause precluding the chattels from vesting absolutely in any tenant in tail by purchase unless he attained twenty-one, but entitling him to the use and benefit thereof during minority. Mr. Rink relied in argument upon the fact that, in the clause which I have to consider, the proviso "so that the same shall not vest absolutely in any "person hereby made tenant in tail by purchase of my "said Mansion House unless such person shall attain the age of "twenty-one years or dying under that age shall leave lawful "issue at his or her death" is followed by the words "yet "nevertheless such tenant shall during his or her respective "minority be entitled to the use and enjoyment of all the said "chattels and effects." Mr. Rink pointed out that in *Lord Scarsdale* v. *Curzon* (2) the Vice-Chancellor referred to these words as being "very strong words," but he very rightly referred me to the case of *In re Lewis* (1) because in that case no great importance seems to have been attached to them. For my part I think that these words must be read as giving the enjoyment to the infant tenant in tail subject to any life interest which may be subsisting. They do not lead me to the conclusion that there are in this will words "reasonably "clear and certain" making the title to the chattels depend on actual possession of the mansion house. In *In re Lewis* (1) to which I have just referred, Astbury J., after considering a series of authorities, held that the vesting of the chattels was not postponed until actual possession of the real estate, but that they vested absolutely in the first tenant in tail by purchase when he attained twenty-one although he was then only entitled to the real estate in remainder expectant on the determination of prior interests. That was one of the cases in which *In re Lord Chesham's Settlement* (2) was distinguished.

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(1) [1918] 2 Ch. 308.

(2) 1 J. & H. 40.

The state of my mind after listening to the very able arguments which have been addressed to me is this: I feel great doubt whether this testator intended to make ownership of these chattels dependent on the tenant in tail coming into actual possession of West Park. That doubt is increased by the fact that the word "possession" does not occur in the clause in question, although the words "actual possession" are used over and over again in other parts of the will. In those circumstances, applying as best I can the general rule which was stated by Parker J. in *In re Parker* (3) I think that it is right to decide that Charles, since he became the first tenant in tail by purchase and attained the age of twenty-one years, became entitled to the heirlooms in question. Mr. Russo was prepared to contend that there was no effective disposition of the chattels by this clause, on certain grounds which he was prepared to put before me in argument. If that were so, the chattels in question would fall into the residue; but by the time Mr. Russo began to put his argument I had heard all the arguments on the question whether Charles became entitled to these heirlooms or not, and Mr. Russo said that he did not desire to add to those arguments. Under these circumstances I thought it fair to him to intimate the view which I have just stated. On that, Mr. Russo informed me that all his

(1) [1918] 2 Ch. 308.

(2) [1909] 2 Ch. 329.

(3) [1910] 1 Ch. 581.

arguments in favour of the chattels falling into residue were dependent on the proposition that Charles could not take unless he survived his father, and, that being so, he did not think it right to put those arguments before me.

I will stay proceedings against any persons who are not further interested. The costs, down to date, strictly speaking, ought to come out of residue, but that has been distributed. Therefore they must come out of the capital moneys as between solicitor and client.

Solicitors : *Evelyn Jones & Co., for Jackson & Sons, Fordingbridge ; Baileys, Shaw & Gillett.*

K. R. A. H.

## *In re* CUTCLIFFE'S WILL TRUSTS.

## BREWER *v.* CUTCLIFFE.

[1939. C. 3575.]

MORTON J.

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Feb. 29; Mar. 13.

*Conflict of laws—Will—Settlement in will of real estate in England—Sale of parts of real estate under Settled Land Acts,* 1882–1887—*Investment of part of proceeds of sale in English stock—Death of testatrix's heir at law domiciled in Ontario—Devolution of stock—"Movable" or "immovable"—English law or law of Ontario—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 75, *sub-s.* 5.

Sect. 22, sub-s. 5, of the Settled Land Act, 1882, provides that capital money arising under the Act, while uninvested or unapplied, and securities on which an investment of it is made, shall, for all purposes of disposition, transmission and devolution, be considered as land.

English real estate included in a settlement in an English will was sold under the Settled Land Acts, 1882 to 1887, and part of the proceeds of sale was invested in English stock. In 1897 the testatrix's nephew, who was her heir at law, died domiciled in Ontario, Canada:—

*Held*, that the stock was an immovable, so that the nephew's interest in it devolved, not under the law of Ontario to his next of kin, but under that of England to his heir at law. That conclusion did not conflict with *In re Berchtold* [1923] 1 Ch. 192, where Russell J., who had to decide a question different from that arising in the present case, took the view that the equitable doctrine of conversion did not operate to transform land held on trust for sale into a movable so as to make it devolve according to the lex domicilii.

Observations of Sir Wilfrid Greene M.R. in *In re Cartwright* [1939] Ch. 90, 104, considered and applied.

ADJOURNED SUMMONS. On this summons the question arose whether, under the intestacy of the nephew and heir at law, who died in 1897 domiciled in Ontario, Canada, of a testatrix who died in 1884 in England, certain property devolved in accordance with the law of England or the law of Ontario.

The property was English stock bought with part of the proceeds of the sales, over a period from 1886 to 1888, of English real estate included in a settlement in the will, made in England in 1879, of Sophia Ilbert Cutcliffe (hereinafter called "the testatrix"), who died in England in 1884. In 1897, the testatrix's nephew and heir at law, John Charles Cutcliffe (hereinafter called "the nephew"), died domiciled in Ontario, Canada. He was then, under the testatrix's will, entitled, in the events which had happened, to a vested interest (liable to be divested in certain events) in remainder, expectant on the death of the survivor of his three sisters, in certain English lands settled by the will and in the English stock. The survivor of his sisters died in 1916.

The nephew's wife had predeceased him, and in English law his heir at law was his eldest son, Ashton Bluett Cutcliffe (hereinafter called "the heir at law") and his next of kin were his seven children who survived him. According to an affidavit sworn by Mr. Christopher C. Robinson K.C., of the Canadian Bar, under the law of Ontario the real and personal estate of a man dying on the date of the nephew's death, intestate and domiciled in Ontario, leaving surviving him children but no wife, and no descendants of children who had died in his lifetime, would have been distributable equally among the surviving children.

By this summons, taken out on November 7, 1939, John Henry Latham Brewer, one of the trustees of the estates and stock comprised in the settlement made by the testatrix's will, asked (inter alia) whether, on the death on December 20, 1916, of the survivor of the nephew's three sisters, the three equal fifth parts, in which they had life interests under the testatrix's will of (*a*) the stock and/or (*b*) such of the estates as, at the time of the death of the survivor of the sisters, remained subject to the settlement passed (i.) to the nephew's eldest son as the nephew's heir at law and the testatrix's heir at law, or (ii.) to the nephew's next of kin.

The defendants to the summons were the heir at law, and De Courcy Bluett Cutcliffe, another son of the nephew, representing the nephew's next of kin.

*G. A. Rink* for the plaintiff. The question arises, what is the extent of the conversion effected by s. 22, sub-s. 5, of the Settled Land Act, 1882, with regard to the proceeds of sale of land under that Act. (1) Also the question arises whether the investments are to be treated as immovable property, so that the law of England, rather than the law of Canada, applies.

*J. F. Bowyer* for the heir at law. The stock will pass as an immovable under the lex loci situs, and will therefore come to the heir at law.

*In re Berchtold* (2) is a decision on the question of movables and immovables. [He referred to *In re Cartwright.* (3)]

Rule 149 in Dicey's Conflict of Laws, 5th ed., p. 579, is: "The law of the country where a thing is situate (lex situs) "determines whether (1.) the thing itself; or (2.) any right, "obligation, or document connected with the thing, is to be "considered an immovable or a movable." That statement is correct and, from it, it necessarily follows that in the present case the stock is an immovable.

*W. G. H. Cook* for the next of kin referred to footnote (*h*) to the comment on r. 149 in Dicey's Conflict of Laws, 5th ed., p. 581, and to the cases there cited.

It is true that the nephew's interest in the land in England settled by the testatrix's will was an interest in immovables and, in English law, passed, on his death, to his eldest son or to his eldest son's heir. But the nephew took the stock as money. Therefore, being his money, it passed to his next of kin. Thus, whether English or Canadian law applies, there is no question of conversion under the Settled Land Act, 1882. Even if s. 22, sub-s. 5, of that Act does apply, nothing in the authorities binds the Court on that point. *In re Berchtold* (2) is in the next of kin's favour on that point. [He referred to *In re Bond* (4), and Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., pp. 941, 942*n*.]

(1) Sect. 22, sub-s. 5: "Capital "money arising under this Act "while remaining uninvested or "unapplied, and securities on "which an investment of any such "capital money is made, shall, for "all purposes of disposition, "transmission, and devolution, be "considered as land, and the same "shall be held for and go to the "same persons successively, in "the same manner and for and on "the same estates, interests, and "trusts, as the land wherefrom "the money arises would, if not "disposed of, have been held and "have gone under the settlement."

(2) [1923] 1 Ch. 192.

(3) [1939] Ch. 90.

(4) [1901] 1 Ch. 15.

The nephew intended that his interest in the stock should devolve, on his death, as personalty. On the knowledge that is required for election, see Lewin on Trusts, 14th ed., p. 818, where it is stated that "To constitute an act of election it is "not necessary that the person entitled, as, for instance, to "money to be laid out in land, should know that but for the "act of election it would pass as land, but it is sufficient if the "Court can collect the intention that, with or without such "knowledge, he meant the money to be dealt with and treated "as money." [He referred to *In re Gordon.* (1)]

*J. F. Bowyer* in reply on r. 149 in Dicey's Conflict of Laws. It follows from the rule that, whether the stock is movable or immovable property, English law applies. The law that applies must be statute law. The only question left is whether land is movable or immovable, and there can be no doubt on that. The word "devolution" in the sub-section is wide enough to cover this case. [He referred to *Chatfield* v. *Berchtoldt.* (2)]

*Cur. adv. vult.*

1940. March 13. MORTON J. Sophia Ilbert Cutcliffe, of Barnstaple, Devon, whom I shall call the testatrix, died on October 24, 1884. Her heir at law was her nephew, John Charles Cutcliffe. He died on April 11, 1897, intestate, and domiciled in the Province of Ontario in the Dominion of Canada. His wife predeceased him. According to English law, his heir at law was his eldest son, the first defendant, Ashton Bluett Cutcliffe, and his next of kin were his seven children who survived him, of whom the second defendant, De Courcy Bluett Cutcliffe, is one. Under the law of the Province of Ontario, the real and personal estate of a man dying on April 11, 1897, intestate and domiciled in the said province, leaving surviving him children but no wife and no descendants of children who had died in his lifetime, would have been distributable equally among such surviving children. I take that statement of the law from the affidavit of Mr. Christopher C. Robinson.

The question which I have to determine is whether, under the

(1) (1877) 6 Ch. D. 531, 538. (2) (1872) L. R. 7 Ch. 192.

intestacy of J. C. Cutcliffe, certain property devolved in accordance with the law of England or in accordance with the law of his domicil.

The events giving rise to this question are as follows: By her will, dated September 20, 1879, the testatrix devised her real estate, all of which was in England, to the trustees of her will upon certain trusts, which I need not state in detail. In the events which happened, she effectively and completely disposed of two-fifths of her real estate. John C. Cutcliffe took the income of these two-fifths during his life, and on his death the capital passed to his children. The testatrix also effectively disposed of the income of the remaining three-fifths thereof, until the death of the survivor of J. C. Cutcliffe's three sisters, her nieces, upon trusts in favour of these nieces. No one of the nieces ever had any children. The survivor of the three nieces was Isabel Prestwood Watts, and she died on December 20, 1916. At the date of her death, she was receiving the income of three-fifths of the testatrix's real estate under the trusts of the will. The will contained the following proviso: "Provided always that if any of them my said nephew "and nieces shall die without leaving issue who being a son "or sons shall attain the age of 21 years or being a daughter "or daughters shall attain that age or marry then I direct "that the shares or share to the income of which such nephew "or niece is entitled for life under the trusts hereinbefore "declared shall be held in trust for the issue of the others or "other of them my said nephew and nieces who shall die "leaving issue in equal shares per stirpes such interest to "be vested in males on attaining the age of 21 years and in "females on attaining that age or on marriage."

The testatrix gave her residuary personal estate to her trustees upon certain trusts for sale, for payment of her debts and funeral and testamentary expenses and the legacies bequeathed by her will, and upon trust to invest the surplus of the proceeds of sale as therein mentioned. She directed her trustees to hold such investments, and the interest, dividends and income arising therefrom, "upon such and the like "trusts in all respects whatsoever as are hereinbefore declared "and contained of and concerning my said real estate and the "income thereof respectively."

On July 1, 1936, my brother Crossman made an order whereof the material portion is as follows: "This Court "doth declare that on the true construction of the will of the "above-named testatrix Sophia Ilbert Cutcliffe and in the "event that happened of the late plaintiffs Ilbert Mary "Cutcliffe Ida Elizabeth Cutcliffe and Isabel Prestwood Watts "dying without issue the shares of the testatrix's residuary "personal estate to the income of which they had respectively "been entitled for life under the trusts of the testatrix's will "were undisposed of by that will as from the death of the late "plaintiff Isabel Prestwood Watts." This being the result of the proviso which I have quoted, as regards three-fifths of the testatrix's residuary personal estate, it was conceded in the argument before me that three-fifths of the testatrix's real estate was also undisposed of as from the death of Isabel Prestwood Watts.

Under these circumstances, it seems clear that on the death of the testatrix in 1884, her heir at law, J. C. Cutcliffe, became entitled to three-fifths of her real estate in remainder expectant on the decease of the survivor of the three nieces named in the will. His interest in remainder was liable to be defeated wholly or partially if all or some one or more of his sisters had children, but this event did not happen.

It would seem equally clear, but for the events which I am about to mention, that on the death of J. C. Cutcliffe intestate, his interest in this real estate, being an interest in immovables situate in England, would devolve upon his eldest son and heir at law, the first defendant. But during the period between the death of the testatrix in 1884 and the death of J. C. Cutcliffe in 1897, certain parts of the real estate devised by the testatrix's will were sold under the provisions of the Settled Land Acts. The proceeds of such sales were paid to two persons resident in England, who, by an order of December 4, 1886, had been appointed trustees, for the purposes of the Settled Land Act, 1882, of the settlement made by the testatrix's will. The trustees invested part of the proceeds of sale in the purchase of other lands and the remainder in the purchase of 1962*l.* Caledonian Railway 4 per cent. debenture stock, which is now represented by 1962*l.* London, Midland and Scottish Railway 4 per cent. debenture stock.

Thus, in the events which happened, when J. C. Cutcliffe died in 1897, he was entitled to a vested interest (liable to be divested in certain events) in remainder expectant on the death of the survivor of his three sisters in (*a*) certain lands in England settled by the will of his aunt, and (*b*) a sum of Caledonian Railway debenture stock, representing the proceeds of sale of other lands subject to the same settlement.

It is admitted that the interest of J. C. Cutcliffe in the lands above mentioned was an interest in immovables and passed on his death to the first defendant or his heir, according to English law. But it is argued that his interest in the debenture stock was an interest in a movable, and passed, under the law of Ontario, to all his children living at his death in equal shares.

I have to decide whether in 1897 this debenture stock was a movable or an immovable. If it was a movable, the devolution of J. C. Cutcliffe's interest therein would be governed by the law of Ontario. If it was an immovable, the devolution of J. C. Cutcliffe's interest therein would be governed by the law of England. This question is still of some importance, since the provisions of s. 22, sub-s. 5, of the Settled Land Act, 1882, to which I shall shortly refer, are reproduced in substance in s. 75, sub-s. 5, of the Settled Land Act, 1925. I start with this rule, which is, I think, well established, that the question whether particular property is a movable or an immovable is decided according to the lex situs: see, for example, *In re Berchtold.* (1) It seems to me clear that this investment, being debenture stock of a British company, and being capital moneys held by the trustees, resident in England, of a settlement of land in England made by the will of an English testatrix, must be regarded as being situate in England for the purposes of the rule stated above.

Was this stock in 1897 a movable or an immovable, according to the law of England? In my view it was an immovable.

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(1) [1923] 1 Ch. 192, 199.

Sect. 22, sub-s. 5, of the Settled Land Act, 1882, provides as follows: "Capital money arising under this Act while remaining "uninvested or unapplied, and securities on which an investment "of such capital money is made, shall, for all purposes of "disposition, transmission, and devolution, be considered as "land, and the same shall be held for and go to the same "persons successively, in the same manner and for and on the "same estates, interests, and trusts, as the land wherefrom "the money arises would, if not disposed of, have been held "and have gone under the settlement." The important words are: "shall, for all purposes of devolution, be considered as "land." The question which I am considering is a question as to the devolution of this stock under the intestacy of J. C. Cutcliffe, and in my judgment this section tells me that for this purpose I must treat the stock as being an immovable.

Considering the matter without reference to any previous decisions, I should arrive at the conclusion that J. C. Cutcliffe's interest in this stock passed on his death to his heir at law, the first defendant. It is suggested, however, by counsel for the second defendant that such a conclusion would conflict with certain observations of Russell J. (as he then was) in *In re Berchtold* (1) referred to above. The decision in that case is accurately summarized in the head-note, which is as follows: "When a person domiciled in a foreign country dies intestate "leaving an interest in the proceeds of sale of English freeeholds "which are subject to a trust for sale but not yet sold, such "an interest is an immovable, and the succession thereto is "governed by the lex situs." Thus it is clear that the question which Russell J. had to decide was not the same as the question which I have to decide. But counsel for the second defendant relies on the following passage from the judgment of Russell J. (2): "On behalf of the Countess Szokolyi it was "argued that according to English law land directed to be sold "and turned into money must be considered to be money; "and that on the principle that equity considers done what "should be done, the Birmingham freeholds are, in the eye "of the law, money. This argument, to be effective, must add

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(1) [1923] 1 Ch. 192, 199.

(2) Ibid. 205, 206.

"the words 'for all purposes.' That the Birmingham free-"holds are to be treated as money for some purposes, no one "doubts. Thus the interest of the taker is personal estate. "But this equitable doctrine of conversion only arises and "comes into play where the question for consideration arises "as between real estate and personal estate. It has no relation "to the question whether property is movable or immovable. "The doctrine of conversion is that real estate is treated as "personal estate, or personal estate is treated as real estate; "not that immovables are turned into movables, or movables "into immovables. As Farwell L.J. pointed out in *In re* "*Hoyles* (1) the fact that a mortgage is regarded as personal "estate for certain purposes in questions between our fellow "subjects here has no bearing on the question whether such a "mortgage should be regarded as a movable or not in questions "of international law." It is clear from this passage that in the view of Russell J. the equitable doctrine of conversion did not operate to transform land held upon trust for sale into a movable, so as to make it devolve according to the lex domicilii.

In the present case, however, I find there is a statutory provision that the stock in question shall for all purposes of devolution be considered as land. In my view that provision has this effect, that, in deciding whether the law of England or the law of Ontario governs the devolution of J. C. Cutcliffe's interest in this stock, I must consider that this stock is land. I do not know what decision Russell J. would have given in *In re Berchtold* (2) if there had been in existence in 1923 a statute which provided that "land held upon trust for sale, "while remaining unsold, shall for all purposes of disposition, "transmission and devolution be considered as money." There was not in 1923, and there is not to-day any such statute. Russell J. was considering only whether the equitable doctrine of conversion transformed land into a "movable." This being so, I do not think that the decision of Russell J. or his reasons for that decision compel me to treat the stock in question as a movable and to hold that its devolution is governed

(1) [1911] 1 Ch. 179, 187. (2) [1923] 1 Ch. 192.

by the law of Ontario. In my view, having regard to the rule which I have stated above and to the provisions of s. 22, sub-s. 5, of the Settled Land Act, 1882, I ought to regard this stock as an immovable, and to hold that the devolution of J. C. Cutcliffe's interest in this stock was governed by the law of England. If this is so, his interest passed to the first defendant as his heir at law. I am supported in this view by certain observations of Sir Wilfrid Greene M.R. in *In re Cartwright.* (1) The Master of the Rolls said this: "The "next argument is the one which came first in order of time, "that sub-s. 5 of s. 75 of the Settled Land Act, 1925, only "effects conversion for the purposes of disposition, transmission "and devolution under the settlement itself, and does not "operate to affect the nature of capital money and its disposition, transmission and devolution for any purpose outside "the settlement. I have some difficulty in following the "logic of that argument in the circumstances of this case. At "the date when the settlor died there was in existence property "which for the purposes of this argument is to be assumed to "have been at that moment in the eye of the law real estate. "The question is: Is that property personal estate for the "purpose of Lord Kingsdown's Act? If in the eye of the law "it was at that moment real estate, the answer is in the negative. "I cannot see how there is any room for a suggestion that in "some way or another what we are dealing with here is something outside the four corners of the settlement altogether. "If you have something which had got out of the settlement, "so to speak, there is nothing left for sub-s. 5 to operate upon, "but when you look at the critical moment, namely, the "moment of death, and ascertain what was the nature of the "property at that moment, it seems to me that the answer "is quite clear." These observations were based on s. 75, sub-s. 5, of the Settled Land Act, 1925, which reproduces s. 22, sub-s. 5, of the Settled Land Act, 1882, with certain variations which seem to me immaterial for the present purpose.

Counsel for the second defendant put forward the alternative argument that there had been some election by J. C. Cutcliffe

(1) [1939] Ch. 90, 104.

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during his lifetime which operated to make his interest in this stock devolve on his death as personalty. In my judgment this argument is wholly without foundation. In the first place, J. C. Cutcliffe was not, at any time during his life, in a position which entitled him to make any such election. In the second place, assuming that he could have so elected, there is not a shred of evidence that he did so elect. The cases referred to by counsel in support of this argument were decisions on facts which differ widely from the facts in the present case. In my view, they afford no support to the argument put forward in the present case, and it is unnecessary to examine them in detail.

For these reasons, I decide that on the death of J. C. Cutcliffe, his heir at law, the first defendant, became entitled to the interest of J. C. Cutcliffe in three-fifths of the debenture stock in question. That interest became an interest in possession on the death of Isabel Prestwood Watts on December 20, 1916.

Solicitors: *Vandercom, Stanton & Co., for Brewer & Son, Barnstaple.*

K. R. A. H.

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## *In re* PAYNE.

## POPLETT *v.* ATTORNEY-GENERAL.

[1939. P. 794.]

*Revenue—Estate duty—Property settled by testator in lifetime—Voluntary settlement on family—Death of settlor within three years—Change of investments—Increase in value of settled property—Duty levied on settled property as at date of death—Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*).

A settlor by a voluntary settlement in effect settled—(*a*) the benefit of a certain option and (*b*) a sum of 10,000*l.*, which, in exercise of the option, was immediately invested by the trustees in the shares of a company of which the settlor was a director and a principal shareholder. The settlor died within three years of the date of the settlement. Between the date of the settlement and the date of the settlor's death the trustees had made changes in the investment of the settled funds, and, owing to an issue of a capital bonus by the company and a considerable appreciation in the value of its shares the value of the trust was nearly 50,000*l.* at the date of the settlor's death:—

*Held*, affirming the decision of Simonds J. [1939] Ch. 865, that the words "property taken" within the meaning of s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, was the property in the possession of the trustees at the date of the death of the settlor, as representing the property transferred to them by the settlement, and that the value of those items was to be aggregated with the settlor's estate for the purpose of ascertaining the appropriate rate at which the duty exigible was to be calculated.

APPEAL from Simonds J. (1)

These proceedings were begun by originating summons under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, for the purpose of determining certain questions with regard to the estate duty payable on property subject to a declaration of trust made by the late Captain Matt Payne on January 29, 1936. The plaintiffs were the trustees of the declaration of trust.

The facts were not in dispute. In January, 1936, Captain

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(1) [1939] Ch. 865.

Payne was the sole registered proprietor of a number of patents and was the joint registered proprietor with his brother, William A. Payne, of other patents. He was at the same time a director of the British Thermostat Company, Ld., in which he had a large interest. In the same month an agreement was made between that company and Captain Payne and his brother for the purchase of all the patents for the sum of 13,883*l*. in cash, with an option to acquire 8000 1*l*. ordinary shares in the company at 35*s*. a share. On January 29, 1936, Captain Payne, hereinafter referred to as "the settlor," executed a declaration of trust by which, after reciting the position with regard to the patents and that, as part of a family arrangement for making some provision for his parents, his wife and issue, and other members of his family, he was desirous of settling his estate, share or interest in the said patents and in the proceeds of sale thereof, he declared that he and the trustees of that declaration, to be appointed as thereinafter provided, would hold the same on trust to permit the same to remain as invested or to sell and convert the same into money and invest the proceeds in the names of the settlor and his said brother as therein mentioned. He then directed that the trustees should stand possessed of the trust fund on certain beneficial trusts therein set out. It is unnecessary to refer to them in detail. On the same day, in part fulfilment of the agreement already made, the settlor, in consideration of the sum of 10,000*l*. then paid to him by the British Thermostat Company, Ld., assigned to the company the patents or (as the case might be) his share and interest in the patents referred to in the schedules to the assignment. The sum of 10,000*l*. was in fact paid by the company to the settlor by a cheque drawn in his favour, which he then paid into an account opened with the Westminster Bank in the names of himself and his brother as trustees. On the same day, by a further assignment, to which the settlor, his brother, W. A. Payne, and the company were parties, after recitals whereby it appeared that the settlor desired to give to his brother the benefit of the patents mentioned in the first schedule thereto and the interest of the settlor in the patents mentioned in the second schedule thereto, and that his brother had agreed to sell the same to the company for 3883*l.*, the settlor, in consideration of the sum of 3883*l.* paid by the company to his brother assigned to the company the patents or (as the case might be) the share and interest of the settlor in the patents mentioned in the first and second schedules thereto. The sum of 3883*l.* was duly paid to W. A. Payne.

In neither assignment was anything said about the option to take shares in the company, but this option was in fact part of the consideration for the transfer of patents or patent rights, and it became exercisable by the trustees and W. A. Payne in the proportion which 10,000*l.* bore to 3883*l.* On the same day the trustees exercised the option so far as they had funds available, paying 10,000*l.* to the company and becoming entitled to 5714 and 10/35ths 1*l.* shares. On the same day W. A. Payne paid 3883*l.* to the company and acknowledged himself indebted to the company in the further sum of 117*l.* by way of subscription for 2285 and 25/35ths 1*l.* shares, and requested the company to issue 2000 of such shares to him, and the remaining 285 and 25/35ths shares to the settlor and him as trustees of the declaration of trust. This was duly done, so that the trustees had allotted to them 6000 ordinary shares of 1*l.* each, of which 285 and 25/35ths shares were in effect settled by W. A. Payne, the remaining 5714 and 10/35ths being the investment of the sum of 10,000*l.* settled by the settlor.

On February 6, 1937, the settlor died, and on May 6, 1937, W. A. Payne died. In each case less than three years elapsed between the date of settlement and death, so that claims arose for estate duty under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, as varied by the Finance (1909-10) Act, 1910. The capital of the company before January 18, 1936, was 50,000*l.*, divided into 25,000 preference shares of 1*l.* each and 25,000 ordinary shares of 1*l.* each, but on that day it was increased to 150,000*l.* by the creation of 100,000 further ordinary shares of 1*l.* each. At or about the same time, an option was given to the settlor and his brother to take up 8000 shares at 35*s.* each, and the directors of the company were authorized to issue 10,000 ordinary shares at the price of 30*s.* a share to existing shareholders and had placed at their disposal a further 1385 similar shares to issue at the same price as they might consider in the best interests of the company, but none were in fact issued.

Further alterations were from time to time made in the capital structure of the company. In April, 1936, bonus shares at the rate of one share for every share held were issued to the ordinary shareholders. In May, 1936, the preference shares were converted into ordinary shares and each share was divided into four shares of 5*s.* each. At the same time 48,000 shares resulting from the sub-division of certain shares were called "founders' shares" and given certain special rights, 16,000 of these shares being given to the trustees. At the same time the company was converted into a public company and adopted new articles of association. It was exceedingly prosperous, with the result that the ordinary shares of 5*s.* each were quoted at a high figure on the Stock Exchange. Of this fact the trustees took some advantage, realizing some of the ordinary shares before the settlor's death, at which date the trust funds consisted of 15,000 ordinary 5*s.* shares and 16,000 founders' 5*s.* shares of the company, 911*l.* 8*s.* advanced on mortgage, 500 1*l.* shares in De Havilland Aircraft Company, Ld., 65 5*l.* shares in Legal and General Assurance Company, Ld., 100*l.* of stock in the British Electric Traction Company, Ld., 500 shares of 1*l.* each in the Assurance and Finance Trust, Ld., 2500*l.* 2½ per cent. Funding Loan, and 740*l.* 5*s.* 11*d.* in cash. The total value of the various items included in the trust was, at the date of the death of the settlor, nearly 50,000*l.*

The Crown claimed that estate duty was payable on the trust funds as they existed at the date of the settlor's death, and that the various items of which the trust consisted should be aggregated with the settlor's estate for the purpose of ascertaining the appropriate rate at which the duty exigible was to be calculated. The trustees of the settlement contended that they were liable to pay estate duty only on the original 10,000*l.* settled by the settlor.

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Simonds J. decided in favour of the Crown on both points. The trustees of the settlement appealed.

*Cyril King K.C.* and *F. Grant* for the appellants.

The property settled by Captain Payne was the sum of 10,000*l.* and an option to purchase certain shares at 35*s.* a share, which was the fair value of the shares at that time. Estate duty therefore became payable at the death of the testator on 10,000*l.* only and not on the enhanced value of the shares representing that trust fund at the date of the testator's death. There is no intendment in a revenue statute and regard must be had solely to the words of the particular statute to see what property is charged with duty: *Adamson* v. *Attorney-General.* (1)

Here the relevant provision is s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which provides that property passing on the death shall be deemed to include property which would be required on the death to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, treated as extending to real as well as personal property and with certain omissions. The material provision here is s. 38, sub-s. 2 (*a*), and it has been considered in *Attorney-General* v. *de Préville* (2) where it was laid down that the ambit of s. 2, sub-s. 1 (*c*), of the Act of 1894, incorporating s. 38 of the Act of 1881, was to tax only what would have been taxable if the deceased had died possessed of it and had not given it away within the specified period before his death. Further the charge under the Act of 1894 depends only on the charge imposed by s. 38 of the Act of 1881 as amended. That section was also considered in *Attorney-General* v. *Gosling* (3) and it is a decision on s. 38, sub-s. 2 (*c*). It is to be noted that sub-head (*c*) refers to "any "property passing" and sub-head (*a*) to "any property . . . . "taken under a disposition." The whole object of sub-head (*a*) is to prevent the revenue being deprived of tax which would have been payable at the deceased's death. Here, all the

(1) [1933] A. C. 257.
(2) [1900] 1 Q. B. 223.
(3) [1892] 1 Q. B. 545.

enhancement in value of the settled property took place outside the control of the donor, for the position does not differ from one in which the trustees were strangers. It is obvious that if the settlor had made an absolute gift of the 10,000*l.* to A, that amount alone could be taxed and it can make no difference that here the property was settled. The property "taken" is that which was vested in the trustees of the settlement, namely, 10,000*l.* The Crown suggested in the Court below that the property taken was the 10,000*l.* together with the powers and duties vested in the trustees, but a power in relation to property is not taxable: *Tremayne* v. *Rashleigh.* (1)

The subject-matter of the settlement is 10,000*l.*, and it is that on which tax is payable.

[LUXMOORE L.J. Has there ever been a case where the value of a gift decreases by the time tax becomes payable?]

In such a case the revenue authorities only claim tax on the lesser amount. In the Court below the case was made that a gift of settled property stood on a different footing from a gift out and out and reliance was placed on s. 5, sub-s. 2, of the Act of 1894, which exempted settled property from further duty until the death of a person competent to dispose of it. It was said, therefore, that settled property retained its identity. Settled property is defined in s. 22, sub-s. 1, as meaning property comprised in a settlement. It was said, therefore, that the charge for duty was on the value of the settled property at the death. But it is to be observed that s. 5 is in no way a charging section and has no bearing on s. 38, sub-s. 2 (*a*), of the Act of 1881, and that the ambit of the charge must be determined from that section. *In re Hodson's Settlement. Brooks* v. *Attorney-General* (2) has no bearing on this part of the case, though it will have when the Court comes to consider the further question as to aggregation. In that case no question arose as to the date at which settled property was to be valued for purposes of estate duty. As already stated the whole test here is what was the property "taken" and that was clearly 10,000*l.* and no more.

(1) [1908] 1 Ch. 681. (2) [1939] Ch. 343.

[CLAUSON L.J. On the facts may not the true view be that what was settled was certain patent rights ?]

It is submitted not. Simonds J. came to the conclusion that all the settlor had to settle was the proceeds of sale of the patents (being 10,000*l.*) and the option to invest in shares of the British Thermostat Company. The only authority directly bearing on the present question is *Lord Strathcona* v. *Inland Revenue* (1), but then in that case there is so much difference of opinion among the judges that it is hard to extract any clear principle. Lord Clyde's view is specially relied on. He held that the value must be taken at the death of the settlor, but that the thing to be valued was to be viewed at the date of the settlement.

The second point raised in this case related to aggregation, but in view of the clearly reasoned judgment in *In re Hodson's Settlement* (2), he found it impossible to argue that there would not be aggregation.

Then remained for consideration the question arising in regard to W. A. Payne's settlement.

[SCOTT L.J. It will be better to hear out the whole arguments on the case argued before considering the second case.]

[They also referred to *Attorney-General for Ontario* v. *National Trust Co., Ld.* (3)]

*J. H. Stamp* for the respondent. It is a curious incidence of the appellants' argument that they find it necessary to give different meanings to " taken under " in s. 38, sub-s. 2 (*a*), of the 1881 Act, and " passing under " in s. 38, sub-s. 2 (*c*). There is no justification for drawing them so far apart as to say that when the very same disposition comes within the terms of both sub-heads, their effect differs as regards the property subjected to tax. In the very case before this Court the disposition might have been brought within sub-head (*c*) as well as sub-head (*a*) if a power of revocation had been appended, for that power makes no difference to the character of the gift until the power is exercised: *Adamson* v. *Attorney-General.* (4) The 10,000*l.* has gone out of existence and no

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(1) 1929 S. C. 800.
(2) [1939] Ch. 343.
(3) [1931] A. C. 818.
(4) [1933] A. C. 257, 282.

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longer affects the case. *Attorney-General* v. *de Préville* (1) has no bearing on what is the property taken out. The value of the trust is affected by what the trustees do with the funds. The equity of the case is to take the value of the trust funds at a given moment ; here the date of the death of the settlor. If the value of the trust funds had declined to 2500*l.* at that date the beneficiaries could not be made to pay estate duty on 10,000*l.* Sect. 5, sub-s. 2, of the Finance Act, 1894, is the most significant one, and it is not affected by having its scope reduced by Acts.

*Cyril King K.C.* replied.

*Cur. adv. vult.*

1940. Mar. 19. SCOTT L.J. This is an appeal by trustees from a decision of Simonds J. on an originating summons under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, taken out by them for the purpose of determining two questions as to the estate duty payable by them under s. 8, sub-s. 4, and s. 4, sub-s. 1, of the Finance Act, 1894. Question 1 : " What was the property on the "value of which duty became payable according to s. 2, "sub-s. 1 (*c*), of the Finance Act, 1894 (as amended) under a "voluntary settlement made by one Matt Payne in January, "1936, by way of gift, he having died on February 6, 1937, "within three years of making it ? " ; and question 2 : " Is that "property to be aggregated under s. 4 on its value at the "date of death, with the rest of the estate of the deceased "settlor ? "

We heard full argument, and were asked by the appellants upon the first question to consider several decisions, but in the result the determining points of law are, in the opinion of all of us, dependent on the true construction of certain statutory provisions upon which the authorities give no direct help. None the less, I cannot help agreeing with the learned judge that procedure by information rather than summons would clarify, and probably simplify, the issues better in estate duty cases where there is any degree of complication, even although the solicitor to the Inland Revenue may, as he did here, assist the subject by writing an informal letter stating the ways in which the Board put their claims.

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(1) [1900] 1 Q. B. 223.

I have had the advantage of reading the judgments of both my colleagues, who arrive at the same conclusion as I do that the appeal should be dismissed, though by slightly different reasoning. Where Luxmoore L.J. differs from Clauson L.J. a little on the construction of the 1894 Act I find myself in agreement with the former.

I will deal first with question No. 1, and it will be convenient to quote on that question certain of the statutory provisions, including s. 1, although the claim is under s. 2, sub-s. 1 (*c*), of the Act of 1894: Sect. 1: "In the case of "every person dying . . . . there shall, . . . . be levied and "paid, upon the principal value . . . . of all property, real "or personal, settled or not settled, which passes on the "death . . . , Estate duty." Sect. 2, sub-s. 1: "Property "passing on the death of the deceased shall be deemed to "include the property following, that is to say: . . . . (*c*) "Property which would be required on the death of the "deceased to be included in an account under section thirty-"eight of the Customs and Inland Revenue Act, 1881 [as "amended] if those sections were herein enacted and extended "to real property as well as personal property, and the "words 'voluntary' and 'voluntarily' and a reference to a "'volunteer' were omitted therefrom." Sect. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as subsequently amended, is as follows: "The personal or moveable property "to be included in an account shall be property of the following "descriptions, viz.:—(*a*) Any property taken . . . . under a "voluntary disposition, made by any person so dying" (i.e., after 1881) "purporting to operate as an immediate gift inter "vivos whether by way of transfer, delivery, declaration of "trust or otherwise, which shall not have been bona fide "made three years before the death of the deceased." Para. (*c*): "Any property passing under any past or future "voluntary settlement made by any person dying . . . . by "deed or any other instrument not taking effect as a will, "whereby an interest . . . . is reserved . . . . to the settlor, "or whereby the settlor may have reserved to himself the "right . . . . to restore to himself, or to reclaim the absolute "interest in such property." Sect. 7, sub-s. 5, of the 1894 Act: "The principal value of any property shall be estimated "to be the price which, in the opinion of the Commissioners, "such property would fetch if sold in the open market at the "time of the death of the deceased." Sect. 22, sub-s. 1: " . . . . unless the context otherwise requires"; "(*f*) . . . . " 'property' includes real property and personal property and "the proceeds of sale thereof respectively and any money or "investment for the time being representing the proceeds of "sale"; (*h*) . . . . 'settled property' means property com-"prised in a settlement."

Simonds J. stated the facts at length, and I accept his statement except on two small but not unimportant points, where I agree with Luxmoore L.J. I re-state the facts only so far as necessary to explain the reasoning by which I reach my conclusion, agreeing in the result with that of the learned judge. The appellant trustees, whilst admitting liability to duty on a figure of 10,000*l.*, contended that that figure is the limit of their liability, on the ground that the settlor merely made a donation of that sum of money, the sterling value of which could not, in the absence of fresh currency legislation, change between the date of the gift and the date of the death. The figure of the revenue's claim, on the other hand, was nearly 50,000*l.*, for their contention was that the subject-matter of the gift "taken" by the recipients (whether the trustees or the beneficiaries be regarded as the takers) was the whole settled fund which had, in the intervening twelve months between the settlement and the death, appreciated up to that value. The learned judge decided in favour of the revenue.

The deceased man, Captain Matt Payne, was evidently an inventive genius with a practical sense of what inventions were likely to prove commercially fruitful. He was director and chairman of a private company called the British

Thermostat Company, Ld. He had been in the habit of giving them the free use, without payment, of his inventions. Most of them were fully protected by British and foreign patents, of which he was owner or part owner. Other of his inventions, though not yet patented, were either "accepted" or claimed and provisionally protected. To all of his patent rights I refer inclusively as "the patents." His brother, W. A. Payne, was also a director, and he died on May 6, 1937. In regard to him there is a smaller claim by the revenue, also pending on appeal before us, similar to the claim in this appeal, but in this judgment it is not necessary further to refer to it.

The company's authorized capital was 25,000 preference and 25,000 ordinary shares of 1*l.* each. It had prospered, having over a period of seven years ending July, 1935, paid an average dividend on its ordinary shares of 33½ per cent., and also accumulated a general reserve of 7800*l.*, and undistributed profit of nearly 11,800*l.*, and having distributed 1*l.* bonus shares to the amount of nearly 12,000*l.* In January, 1936, it created another 100,000 ordinary shares of 1*l.* each. Captain Payne in that month was minded to make provision "as part of a family arrangement" for his parents, wife, issue, and other members of the family by settling his interests in his inventions and patent rights and in the proceeds of sale thereof on trusts for them, and on January 29, 1936, made a declaration by deed poll accordingly, in which he was the settlor, in the following terms: By clause 1 he appointed himself and his brother, W. A. Payne, the first trustees and authorized "the trustees" (which was to include subsequent trustees) to sell the patents, etc., and to invest the proceeds in investments authorized by the settlement. Clause 2 contained the family provisions. There was no provision for any ultimate interest reverting to the settlor. Clause 5 was a wide investment clause. The schedules contained a long list of patents, granted, accepted, and applied for. Under this deed the beneficiaries took as a gift the benefit of the equitable right to have the trusts of the settlement executed in accordance with its terms, which included the discretionary right of the trustees not only to sell the settlor's interest in the patent and other rights, and to invest the proceeds of sale, but also to change the investments as they might think fit.

Effect was given to the plan of the declaration, with the assent of the company, by two deeds inter partes, both made after but on the same day as the declaration of trust. The first was between Matt Payne as vendor and the British Thermostat Company, Ld., as purchasers (" F.P.2 "). Under it the vendor sold all the said patents, etc., mentioned in the declaration of trust, for the sum of 10,000*l*. He also covenanted thereafter to give the purchasers the benefit of any improvements therein which he might invent.

On the same day he entered into another deed ("F.P.3"). to which his brother W. A. Payne was a party as well as the company. By it he gave to his said brother his " full "interest " in one patent, identified in Schedule I., and such interest as he had in four other patents, particularized in Schedule II., and he and his brother then joined in selling the five patents to the company for the sum of 3883*l*. to be paid to the brother. In other respects the deed was similar to " F.P.2."

The total money consideration paid by the company to the two brothers was thus 13,883*l*., but this was not the only consideration. That figure had been arrived at under an informal and oral agreement with the company on January 22, as appears from the minutes of a meeting of directors on that day at which the two Paynes and two other directors were present. Matt Payne, speaking as chairman, there explained that he valued all the said patents and inchoate rights at that figure, and the other members of the board approved his valuation. It was then resolved that on the understanding that no claim would be made by Matt Payne for the past use by the company of the patents, the company should purchase the patents and rights for that figure, paying 13,883*l*. in cash, and giving to the two brothers as vendors an option to purchase 8000 1*l*. ordinary shares in the company at 35*s*. per share. There was attached to the minute a schedule of the patents; it includes both those which a week later Matt Payne assigned by "F.P.2" and those which he and W. A. Payne together assigned by "F.P.3." On the same day the sums of 10,000*l.* and 3883*l.* were duly paid by cheque to M. Payne and W. A. Payne respectively, and on the same day, the option having evidently been already exercised, certain allotments of shares were made to the two Paynes, which I will explain more fully in a moment. Also on the same day M. Payne, pursuant to the declaration of trust, paid his cheque into the Westminster Bank, Teddington, to the credit of the trustees' account. On the 30th January the trustees by cheque drawn on their trust account paid the sum of 10,000*l.* to the company by way of subscription for 5714 10/35ths ordinary 1*l.* shares in the company at 35*s.*, in accordance with the option, and on the same day W. A. Payne paid his 3883*l.* to the company, and in addition acknowledged himself indebted in a further 117*l.*, making 4000*l.* in all, for 2285 25/35ths shares (which with M. Payne's lot made up the whole 8000 covered by the option), and requested the issue of 2000 to himself, and of the remaining 285 25/35ths to the trustees, thus making for them a total of 6000 shares, paid for at the rate of 35*s.* per share, or 14,000*l.* in all. These transactions on the 30th were in fact merely complementary to the allotment of the above lots of shares by the company to the trustees and W. A. Payne personally made on the previous day in execution of the option.

An agreed memorandum (document 10) contains an account of the actual doings of the company thereafter in relation to its share capital. In April one bonus ordinary share of 1*l.* was issued to the holders of each ordinary share, whereby the 6000 1*l.* shares of the trustees became 12,000. On May 1 the company was converted into a public company, and the ordinary shares were subdivided into 5*s.* shares, the trustees receiving in exchange for their 12,000 shares of 1*l.* each 16,000 founders' shares (with extra voting rights) and 32,000 ordinary, all of 5*s.* Full particulars are also contained in this memorandum of the sales by the trustees, and of their re-investments; but it is unnecessary to state the details.

The company continued to prosper greatly, and by February 6, 1937, the date of the death of Matt Payne, the trust investments and cash together were worth nearly 50,000*l.*

The real, and in my opinion the only, issue on the first question is whether the property given by the settlor and "taken" by the donees is in law to be regarded, as the appellants contend, as being a cheque for 10,000*l.* (that is to say a gift to the trustees equivalent to that sum in cash), or, as the revenue contend, as the totality of the equitable interests conferred by the declaration of settlement on the beneficiaries, covering the whole value of the settled fund and entitling them to have that fund administered as a single continuing corpus for their benefit in accordance with the trusts of the settlement. If the contention of the appellants were right, I agree that the value of the property on which duty would be payable would be 10,000*l.*; if the revenue's contention be right, it is payable on the settled fund as it was at the date of the death, that is to say nearly 50,000*l.* In my opinion it is the latter.

On the facts of this case there can be no doubt that in the words of s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, as re-enacted in the Finance Act, 1894, s. 2, sub-s. 1 (*c*), "any property taken under a voluntary disposi-"tion, made by any person so dying, purporting to operate as an "immediate gift inter vivos, by . . . . declaration of trust," and that the gift was not made as long before the death as three years; and it is indisputable that the gift did take the form of a declaration of trust, by way of settlement upon trustees for the intended beneficiaries. Even apart from the definition of "property" in the Finance Act, 1894, it would, in my view, be right to hold that the property so given was simply the totality of equitable rights created by that declaration of trust in the beneficiaries under it. The essence of those rights, looked at from that point of view, was the power conferred in equity on each beneficiary to require the trustees to administer the trust in accordance with the declaration; and also, if need be, to apply to the Chancery Division to enforce compliance upon the trustees. But no other form or kind of property was the real subject of the gift. The transfer to the trustees of the legal title was mere machinery to effect the gift. The enjoyment of the rights of property so conferred on the beneficiaries did not enure to the trustees: and those equitable rights were ex vi termini, subject to the discretion vested by the trust in the trustees—particularly in regard to the changing of investments. If it be argued that in law the gift was to the trustees, I reply that for the purpose of estate duty the duties imposed and the discretionary powers entrusted must be looked at as a whole, and so regarded they preclude the contention of the appellants that it was a gift (whether to the trustees or to the beneficiaries) of a sum of money. That contention in my opinion assumes a gift absolute in nature and immediate in operation: and both ideas are inconsistent with the discretionary duties and powers of the declaration. As Mr. Stamp said on behalf of the revenue, this was a continuing trust from the moment of its creation to the date of the settlor's death; and his metaphor of a river, the identity of which remains though the particles of water flow on and pass by, if not pushed too far, illustrates the true nature of such a continuing trust. There was never a moment during the period of the existence of the trust when any beneficiary could point to any item of the settled fund and say "that is mine," or to any interest to which he could lay claim except through the trustees and by calling upon them to carry out the trust in accordance with its tenor: nor could the trustees at any time say in any true sense "the settled fund is ours."

An argument was addressed to us by Mr. Cyril King that the 10,000*l*. cheque was given by Matt Payne after he had already agreed to the arrangement of January 22 that he would sell and the company buy the patents for a consideration of 13,883*l*., plus the option to apply for and be allotted 8,000 ordinary 1*l*. shares at 35*s*.; that in equity the patents had already passed to the company; that the declaration of trust could operate only on the proceeds of sale; and therefore that the subject-matter of the trust was the money and not the patents. I think the argument fallacious for more than one reason; but will content myself here with saying that I agree with the reasons given by Luxmoore L.J. in his judgment.

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Much stress was laid in argument by Mr. Cyril King for the appellants upon the word "taken" in para. (*a*) of s. 38, sub-s. 2, of the 1881 Act, in contrast to the word "passing" in para. (*c*). I cannot follow his reasons for that distinction. The word "taken" to my mind is merely the correlative of "given"; just as is the word "received" in sub-s. 4 of s. 8 of the 1894 Act; and I regard the two as synonyms in these contexts. Sub-sect. 4 is the operative provision which puts the duty of accounting upon the appellant trustees, to the extent of the property received by them because "the management of it is vested in them." Sub-sect. 1 of s. 8 continues and applies "the existing law and practice . . . . subject to the provisions of this Act and so far as the same are applicable, "apply for the purposes of collection, recovery and repayment "of Estate Duty. . . . ." The word "taken" therefore either means the same thing as "received" or is replaced by the latter word; just as sub-s. 4 of s. 8 modifies s. 39 of the 1881 Act, and sub-s. 6 of s. 8 modifies s. 40 of the 1881 Act, and as s. 7, sub-s. 5, of the 1894 Act makes the date of death the determining date for estimating the principal value of the property passing or deemed to pass, and supersedes the six months provision of s. 39 of the 1881 Act, upon which my brother Clauson lays some emphasis. The trustees are made accountable just because they receive the property and have its management; but because the trustees of a settlement are made accountable for the ministerial purpose of collection and recovery of estate duty, it does not follow that the character of the property received by them for the purpose of the trusts of the settlement is in any way affected. It is true that the interest of the beneficiaries is equitable whilst the trustees' rights are legal; but it is the settled fund, with its continuing although changing character under the investment trusts of the settlement, which constitutes the property charged with estate duty at the time when it passes or is deemed to pass. It is the trustees in office at that time who are accountable and accountable for the property received by them (s. 8, sub-s. 4, of the 1894 Act). I express my view with the greatest diffidence, but I cannot entirely agree with either of my two learned but differing colleagues upon the interpretation of the 1881 Act when re-enacted in, and modified by, the 1894 Act. It seems to me that the 1894 Act is directed to the nature, state and condition of the property to be valued at the date of the death—whether it be an actual passing under s. 1 or a putative passing under s. 2. It is a percentage of that property tale quale at that moment, which is cut out and kept by the revenue; and in the case of a settled fund it is no more possible to think of it in fact as the trustees' sole property, ignoring the beneficiaries, than it is to think of it in law as the beneficiaries' sole property ignoring the trustees. It is a continuing corpus of property made up of various constituent parts which under the characteristics imparted to it by the terms of the trust may be, and often is, continually varying. It is not questioned that the trustees in office at the time when the duty to account attaches have then the ministerial duty of accounting—with their rights over against the residue left by the revenue; but it seems to me that in essence what is really taxed is the beneficial ownership at that moment, although the machinery of taxation as provided by s. 8 of the 1894 Act, re-enacting, subject to modification, the previous law and practice, is worked for the revenue by the then trustees.

In my view it does not matter what the property was, whether patents, cash, or shares, at the moment on January 29, 1936, when the declaration of trust came into operation. Whatever the property was it instantaneously became subject to the trust and took form as the settled fund; and as such it remained, however much, or however often, it changed its content as the trustees realized and re-invested. The colours changed but the chameleon was still the same animal.

On the issue of amalgamation the Attorney-General is in my opinion right and I adopt what Simonds J. said.

In the result, my colleagues and I are in agreement upon our final conclusions, and thus concur with Simonds J. in both the conclusions which he reached.

The appeal must be dismissed with costs.

CLAUSON L.J. The first question arising on this appeal is whether Simonds J. was right in deciding that the estate duty which admittedly became payable on the death of Mr. Matt Payne in respect of certain property the subject of a declaration of trust of January 29, 1936, is to be calculated upon the value at the date of his death of the assets then held by the trustees of the trust. The facts of the case are fully stated in the learned judge's judgment, and he also refers at length to the somewhat intricate series of sections under which the claim for duty arises. I propose to turn at once to the Customs and Inland Revenue Act, 1881, and to examine it with a view to ascertaining what would have been its operation upon the facts of the present case if the declaration of trust had been executed soon after that Act had come into operation and the deceased had died within three months of its execution. This examination becomes necessary because the criterion for determining in respect of what property the duty under the Act of 1894 is to be calculated is whether, had the Act of 1881 applied, that property would be required to be included in an account delivered under that Act.

That Act dealt primarily with probate duty. Its aim was to arrange for the collection of probate duty by the procedure of requiring an affidavit of the deceased's assets to be stamped with an ad valorem stamp on the value of the assets covered by the probate: but incidentally a new scheme was adopted for imposing a duty of the nature of probate duty on certain personal or movable property which had belonged to the deceased at one time but would not be covered by the probate, and was of such a character that the legislature considered it proper that it should attract duty on much the same lines as if it had not ceased before the death of the deceased to form part of his assets.

The Act enumerates in s. 38 certain descriptions of personal or movable property, all at one time property of the deceased, and by ss. 38 and 39 imposes on every person who as beneficiary trustee or otherwise acquires possession or assumes the management of property within such descriptions the duty of delivering an account verified by oath and stamped according to the value of the property included in it, the duty to arise upon such person retaining the property for his own use or distributing or disposing thereof or in any case within six calendar months of the death.

The claim on the trustees of the declaration of trust to deliver a stamped account would have been based on their having acquired possession or assumed management of certain property of the description specified in s. 38, sub-s. 2 (*a*), that is to say, property taken under a disposition made by Mr. Matt Payne purporting to operate as an immediate gift inter vivos by way of declaration of trust made within the specified period before the death.

The account is to be stamped according to the value of the property included in it, and it is necessary to ascertain what property is to be included in it.

It is to be observed that no duty to deliver the account arises until the death of the donor, and that even so if the person who is to deliver the account is a trustee he is allowed six months from the death for the performance of the duty unless he distributes or disposes of the property before the expiration of that six months. It would seem clear that it is contemplated that the property is property which he may possibly be in a position to distribute or dispose of after, but within six months after, the death. Prima facie it would not seem likely that the Legislature would impose upon a trustee, who has in his hands property of which he is a trustee which he may be in a position to distribute or dispose of, a duty to deliver an account verified on oath of any other property than that in his hands: and this consideration is reinforced when it appears that he has to expend on stamp duty a sum calculated with reference to the value of that property, an expenditure against which it is obviously contemplated that he should be indemnified out of that property. The property to be included in the account must, however, satisfy the qualification that it is property taken under a disposition made by the donor. In the case where the trustee who is called upon to deliver the account is (as in the case now being dealt with) a trustee on a continuing trust created by a disposition made by the dead man, it seems to me, I must confess, reasonably clear that his duty is to insert in his sworn and stamped account particulars of the property which at the date of the donor's death is in his hands as property held on the trusts of the disposition made by the donor, property (I may add) which is saved from having to be inserted in the executors probate affidavit merely by the circumstance that the trustee holds it not for the donor but upon the trusts marked out by the donor's disposition. It is objected that this cannot be right because, so it is said, the property to be inserted in the account must be property of which it can be predicated that it was taken under a disposition made by the donor; in other words, it is said that the word "taken" in s. 38, sub-s. 2 (*a*), must be taken as meaning, and meaning only, taken by the original disponee. The word "taken" in reference to property which ex hypothesi is being particularized by the trustee in whose sworn account delivered at or within six months after the death it has to be included, must in my view be construed not as meaning "taken by the original disponee" but as meaning "in the hands of" the trustee at the material date by virtue of the original disposition of the donor. This is a perfectly possible meaning and if it is accepted the whole scheme of the operation of the Act of 1881 in regard to a trust created by the donor and continuing as an operative trust at his death becomes clear and logical. A possible question might be raised as to whether the property to be included in the account should be the trust property as it stood at the donor's death or as it stood at the date (that is to say six months after the death or in some circumstances sooner after the death) at which the duty to deliver the account became absolute and enforceable. But as in the present case there is no suggestion that the property comprised in the trusts of Mr. Matt Payne's declaration of trust varied within the six months after his death, this refinement need not be pursued.

These considerations appear to me to lead to the conclusion that the property which, in circumstances corresponding to those of the present case (there being no distribution or disposition within six months of the death) would have had to be included in the necessary account under s. 38 of the Act of 1881, would be the property which was at the date of Mr. Matt Payne's death comprised in the declaration of trust. It follows that that is the property which under s. 2 of the Act of 1894 must be deemed to pass on his death. Accordingly I reach the conclusion that the property which is under the Act of 1894 to be deemed to pass on Mr. Matt Payne's death is the property which at Mr. Matt Payne's death was comprised in the settlement, no variation in that property having taken place between the date of Mr. Matt Payne's death and the date when the trustees would (had the Act of 1881 applied) have had to bring in the account. The value of that property will, by reason of s. 7, sub-s. 5, of the Act of 1894, have to be ascertained as at the date when it is to be deemed to pass, that is to say at the date of Mr. Matt Payne's death. Accordingly, the order made by Simonds J. appears to me to be correct.

If I am right in thus holding that the property which attracts duty is that which at the date of Mr. Matt Payne's death was the subject-matter of the trusts of his declaration of trust, it becomes unnecessary to examine what the property was which was initially comprised in those trusts, and I accordingly refrain from discussing that matter.

The only remaining point relates to the question of aggregation. I do not propose to say more on this point than that I am satisfied that the learned judge's decision is correct for the reasons given by him, and I am prepared to adopt his reasoning as my own.

In my judgment, the appeal should be dismissed with the usual result as to costs.

LUXMOORE L.J. By an order dated July 26 last, Simonds J. declared that estate duty became payable on the death of one Matt Payne in respect of the property the subject of a gift made by him through the medium of a declaration of trust dated January 29, 1936, to which I will hereafter refer as "the declaration." The judge further declared that the principal value upon which the estate duty is payable is an amount equal to twenty twenty-first parts of the value at the date of Matt Payne's death of the assets then subject to the declaration, and that the property at the value so ascertained is to be aggregated with the estate of Matt Payne for the purpose of ascertaining the rate at which the duty is to be computed.

The order was made on an originating summons issued under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, by the present trustees of the declaration as plaintiffs against His Majesty's Attorney-General as defendant. The reason why the duty is limited to twenty twenty-first parts of the assets is because certain additional property was made subject to the declaration on the day following its execution by a further disposition made by one W. A. Payne, a brother of Matt Payne. It is agreed that this additional property was, at the date on which it was made subject to the declaration, of a value equal to one-twentieth part of the property settled by Matt Payne. It is common ground that both Matt Payne and his brother W. A. Payne died within the period of three years from the date of the declaration, and it is admitted that estate duty became payable in respect of the respective dispositions by Matt Payne and W. A. Payne, but the contest between the present trustees of the declaration and the Inland Revenue Authorities is with regard to the value in each case to be attributed to property the subject of those dispositions, and also to the question of aggregation.

A separate originating summons was taken out by the present trustees in respect of the property of which W. A. Payne disposed. It is unnecessary to state any of the facts with regard to the last mentioned summons, because although both cases were heard together in the Court below, it was agreed in this Court that in some circumstances different considerations might be applicable to the disposition made by W. A. Payne, and that the more convenient course would be for the second summons to stand over until after this Court had given judgment in Matt Payne's case.

As I have already stated, the present trustees admitted before Simonds J. that estate duty became payable in respect

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of the disposition made by Matt Payne. They also contended, both here and in the Court below, that such duty must be calculated on the sum of 10,000*l.* only on the basis that the property taken under the disposition was a sum of cash to that amount, and that, as the property settled was cash, its value must remain unaltered at the death of Matt Payne, and (2.) that there is no ground for aggregating that sum with the rest of Matt Payne's estate for the purpose of ascertaining the rate of duty applicable.

On the other hand, it was contended on behalf of the Attorney-General, both in the Court below and in this Court, (1.) that the value of the property on which the duty is to be calculated is the market value of twenty twenty-first parts of the respective investments and moneys which were in the hands of the trustees of the declaration on February 6, 1937, the date when Matt Payne died, and (2.) that to ascertain the appropriate rate at which the duty is to be calculated the value of Matt Payne's estate must be aggregated with the twenty twenty-first parts of the value of the respective investments and moneys.

Simonds J. declined to accept the contentions of the trustees, and accepted those put forward on behalf of His Majesty's Attorney-General. The trustees have appealed from the decision of Simonds J.

There is no dispute of fact, but although the material facts are stated by Simonds J., it is, I think, necessary to repeat some of them in order that this judgment may be intelligible. The facts as stated by Simonds J. appear in the report of the case under the title *In re Payne's Declaration. Poplett* v. *The Attorney-General.* (1) The following statement of the facts is mainly compiled from that report. In January, 1936, Matt Payne was the sole registered proprietor of a number of patents, and was the joint registered proprietor with his brother, William A. Payne, of other patents. He was at the same time a director of, and had a large interest in, the British Thermostat Company, Ld. (hereinafter referred to as "the company"). In the same month an agreement was made between the company and Matt Payne and his brother for the purchase of all the

(1) [1939] Ch. 865, 866-7.

patents for the sum of 13,883*l.* in cash, with an option to acquire 8000 ordinary shares in the company at 35s. a share. This agreement is recorded in the minute of a meeting of the directors of the company held on January 22, 1936. On January 29, 1936, Matt Payne executed the declaration. On the same day, in part fulfilment of the agreement already made, the settlor, in consideration of the sum of 10,000*l.* then paid to him by the company, assigned to the company the patents or (as the case might be) his share and interest in the patents referred to in the schedules to the assignment. It appears that the sum of 10,000*l.* was in fact paid by the company to the settlor on the same day by a cheque drawn in his favour, which he then paid into an account opened with the Westminster Bank in the names of himself and his brother as trustees of the declaration. In the assignment nothing was said about the option to take shares in the company, but there is no doubt but that this option was in fact part of the consideration for the transfer of patents or patent rights, and that it became exercisable by the trustees and W. A. Payne respectively in the proportion which 10,000*l.* bore to 3883*l.* The company on the same day, as appears from the minute of the meeting of its directors of that date, allotted to Matt Payne and his brother W. A. Payne, the trustees of the declaration, the shares of the company which were the subject of the option. It would appear, therefore, that the option had already been exercised by the trustees when the allotment was made, and that the learned judge was in error in stating that it was exercised on January 30, 1936, although the 10,000*l.* was not paid to the company in satisfaction of the price of 5714 10/35ths of the said shares until the later date. The capital of the company was from time to time increased, and from time to time bonus shares were issued to the shareholders, including the trustees of the declaration in respect of their respective holdings. The details are immaterial. In May, 1936, the company was converted into a public company. It was exceedingly prosperous, with the result that the shares which had been subdivided into shares of 5*s.* each were quoted at a high figure on the Stock Exchange. Of this fact the trustees took some advantage, realizing some of the shares before the settlor's death, at which date the trust funds consisted of 15,000 ordinary 5*s*. shares and 16,000 founders' 5*s*. shares of the company, 911*l*. 8*s*. advanced on mortgage, 500 1*l*. shares in De Havilland Aircraft Company, Ld., 65 5*l*. shares in Legal and General Assurance Company, Ld., 100*l*. of stock in the British Electric Traction Company, Ld., 500 shares of 1*l*. each in the Assurance and Finance Trust, Ld., 2500*l*. 2½ per cent. Funding Loan, and 740*l*. 5*s*. 11*d*. in cash. It is on the value of these funds at Matt Payne's death that the claim to duty is made.

To determine the questions raised on the appeal it is necessary to consider the material sections of the Acts under which the duty is claimed and its amount is to be ascertained. The duty is claimed under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which (reading it so far as applicable to the present case) provides that "Property passing on the death of the deceased "shall be deemed to include the property following, that is to "say: (*c*) Property which would be required on the death "of the deceased to be included in an account under Section "thirty-eight of the Customs and Inland Revenue Act, 1881, as "amended by Section eleven of the Customs and Inland Revenue "Act, 1889, if those sections were herein enacted and extended "to real property as well as personal property, and the words "'voluntary' and 'voluntarily' and a reference to a "'volunteer' were omitted therefrom."

Sect. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as amended (again reading it so far as it is applicable to the present case) is as follows: "The personal property "to be included in an account shall be property of the following "descriptions, namely (*a*) any property taken . . . . under a "voluntary disposition, made by any person so dying" (i.e., after February 1, 1894), "purporting to operate as an "immediate gift inter vivos, whether by way of transfer, "delivery, declaration of trust or otherwise, which shall not "have been bona fide made three months" (now three years) "before the death of the deceased."

Sect. 7, sub-s. 5, of the Finance Act, 1894, provides that for the purposes of estate duty "The principal value of any "property shall be estimated to be the price which, in the "opinion of the Commissioners, such property would fetch if "sold in the open market at the time of the death of the "deceased."

The first question seems to be what is the meaning in para. (*a*) of s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, of the phrase "property taken." The section appears to me to direct attention in the case of a declaration of trust to the declaration itself, for it is by that document that the disposition of property has been made. It is to be observed that no reference is made to the beneficial interests created under the declaration of trust, nor is any distinction made between the interest of the trustees, if there is an appointment of trustees, and the interests of the beneficiaries. My brother Clauson, whose judgment I have had the opportunity of reading, has come to a conclusion that the meaning of the phrase "property taken" must be ascertained by considering it in the light of the provisions in the 1881 Act, especially s. 39, which defines how and by whom the appropriate accounts for probate duty are to be delivered under that Act. In the result he attributes a meaning to the phrase which admittedly is not the prima facie meaning of the words used. With all respect to his judgment, I see no sufficient ground for departing from that prima facie meaning, especially having regard to the fact that s. 2, sub-s. 1 (*c*), of the 1894 Act provides that s. 38 of the Act of 1881, as amended by s. 11 of the Act of 1889, are to be considered as if they "were herein "enacted."

In my judgment, it is necessary to consider the actual words of the declaration. It contains recitals which set out Matt Payne's interests in a large number of inventions and the letters patent and provisional protection relating thereto respectively, and refers to a schedule in which the inventions of patents are specifically identified. For convenience I will refer to these hereafter as "the patents and patent rights." These recitals are followed by one in which is recorded Matt Payne's desire to make provision for his parents, wife and issue, and other members of his family by settling "my estate share "or interest" in the inventions, patents and patent rights "and in the proceeds of sale thereof and of declaring in respect "thereof" certain trusts. The last-mentioned recital is followed by a declaration which is in these terms: "I do "hereby irrevocably declare that I and the trustees hereof to be "appointed as hereinafter provided shall hold my estate share "or interest in the said inventions and letters patents brevet "d'invention and the other foreign patents and patent rights "and in the proceeds of sale thereof and the investments and "securities which may from time to time by virtue of the "provisions hereinafter contained for varying investments "represent the same and any cash derived from or representing "any part thereof from time to time awaiting investment "(all hereafter collectively referred to as the trust fund)" upon certain trusts to which I do not think it necessary to refer. The essential point to notice is that the property described as subject to the declaration are (*a*) "The patents and "patent rights," (*b*) the proceeds of sale thereof, (*c*) the investments and securities from time to time representing the same, and (*d*) any cash derived from or representing any part thereof from time to time awaiting investment. All these items are described as being collectively referred to as the trust fund. It is the fact that at the time when the declaration of trust was executed Matt Payne had entered into an agreement with the company to sell to it the patents and patent rights the subject of the declaration for the sum of 10,000*l*. and an option to acquire ordinary shares of the company at 35*s*. per share, but, notwithstanding this agreement, the property described in the declaration was the patents and patent rights and the proceeds of sale thereof, and there is no mention of the sum of 10,000*l*. It must, I think, in the absence of evidence to the contrary, be assumed that the declaration was the first document executed on January 29, 1936, for the actual form of the documents is contrary to any other assumption. On the same day Matt Payne assigned to the company by a separate deed bearing the same date the patents and patent rights, and received in payment therefore a cheque drawn by the company in his favour for 10,000*l.*

Simonds J. in his judgment states (1): "It is at least "clear what the settlor settled. He had, before executing "the declaration of trust, agreed to sell the patents "and patent rights the subject of that declaration, and "on the footing that the agreement was carried out, "as in fact it was, he could and did settle nothing more "than the sale price which the company had agreed to "pay him—that is to say, the sum of 10,000*l.*, with an "option to acquire ordinary shares of the company at "35*s.* a share."

I do not myself appreciate why the actual words of the declaration of trust should be departed from. It is plain that from the moment the declaration was executed the trustees thereof had an interest in the patents and patent rights, subject, of course, to the existing agreement for sale, so that if by any chance, no matter how remote, the assignment to the company had not been executed, it would have been impossible to say that the patents and patent rights were not the property taken under the disposition. The actual form of the document by which the disposition is effected seems to me to be material to the consideration of the question, and, with all respect to the learned judge, I can see no justification for departing from the description of the property which is contained in the declaration itself. Having regard to the fact that the agreement for sale of the patents and patent rights must be treated as having been implemented after the execution of the declaration, that which was received by the trustees of the declaration was not 10,000*l.* in cash but 10,000*l.* being the proceeds of sale of the patents and patent rights settled, and it was, I think, clearly identified as such. No one reading the declaration by itself could have any doubt but that the property taken under the declaration of trust was the patents and patent rights. The fact that at the moment of execution of the declaration the patents and patent rights were subject to an agreement for sale but had not been assigned to the company is in accord with the actual form of the declaration.'

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(1) [1939] Ch. 865, 873.

Apart from the description in the declaration, "property" is defined by s. 22, sub-s. 1 (*f*), of the Finance Act, 1894, as including "real property and personal property and the "proceeds of sale thereof respectively and any money or "investment for the time being representing the proceeds of "sale."

In my judgment, the property taken under the declaration is the patents and patent rights, and this conclusion is sufficient to dispose of the first question, and to answer it in the same way as it was answered by Simonds J., for it is admitted that if the property taken is the patents and patent rights, estate duty is exigible on the value at the death of Matt Payne of the various items which now represent that property and the proceeds of sale thereof and the investments for the time being representing the same, and consequently estate duty is payable on that value.

The main foundation of the argument that estate duty could not be exigible on any sum in excess of 10,000*l.* was the submission that the property taken under the declaration was 10,000*l.* in cash, although that sum is nowhere mentioned in the declaration. Both in the Court below and in this Court counsel for the respondent accepted the proposition that the declaration was a settlement of 10,000*l.*, but he sought to differentiate between a gift of 10,000*l.* in cash and a gift of that sum to trustees to invest and hold on behalf of other persons for divers beneficial interests. It may be that there is such a distinction, but the argument appeared to me necessarily to involve the consequence that the words "property taken" in s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, must be construed as if they were "the property taken by the beneficiaries"; for it was contended that the "property taken" was not 10,000*l.*, but an equivalent sum which must be invested in accordance with the directions for that purpose contained in the declaration. In other words, it was argued that the direction to invest was an integral attribute of the property taken which

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could not be separated from it, and for this reason differentiated it from 10,000*l.* in cash. I find it difficult to accept this contention, for it seems to me to ignore the position of the trustees, and to consider only that of the beneficiaries; whereas so far as the property taken is concerned, the fact that the trustees are given the legal interest cannot be divorced from the provisions in the declaration defining the beneficial interests. In my judgment, in considering what is the meaning of the phrase "property taken" it is necessary to consider not only the equitable interests of the beneficiaries but also the legal interest of the trustees, and consequently the property taken is that which is transferred to the trustees.

Having regard to the conclusion at which I have arrived, namely, that the property taken under the declaration was the patents and patent rights, I do not think it is really necessary to consider what consequences might have resulted if the property disposed of had been described in the declaration simply as a sum of 10,000*l.*, and I refrain from so doing. I think it right, however, to point out that there is no greater justification for contending that the subject-matter of the declaration is 10,000*l.* in cash than there is for contending that it is the shares in the company actually paid for out of that sum, for, as already stated, it appears from the minutes of the meeting of the directors of the company, at which both Matt Payne and W. A. Payne were present, held on January 29, 1936, being the same day on which Matt Payne assigned the patents and patent rights to the company and received the cheque for 10,000*l.*, that the shares the subject-matter of the option, which also formed part of the purchase price for the patents and patent rights, were allotted by the company to the trustees of the declaration, and that on the day following, January 30, 1936, the 10,000*l.* was repaid to the company in payment of the shares so allotted. Whether the property taken under the declaration be as therein expressed, the patents and patent rights in question, or in substance the shares allotted to the trustees in performance of the arrangements between the company and Matt Payne and his brother, the same result follows, for what was subject

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to the declaration at Matt Payne's death represented either the proceeds of sale of the patents and patent rights or of the shares originally taken by the trustees in the exercise of the option. Although I have arrived at the same conclusion as that expressed by Simonds J. by a different route, I agree with the answer that he gave to the first question.

The only other question which remains is whether the value so to be ascertained is to be aggregated with Matt Payne's estate for the purpose of ascertaining the appropriate rate at which the duty exigible is to be calculated. It is sufficient to say that I find myself in complete agreement with the judgment of Simonds J. and the reasons there stated, and that I do not desire to add anything to it.

I think it right to state that during the argument a number of questions were canvassed on both sides to establish that many anomalous results might arise in considering the method of valuing property the subject-matter of an absolute gift. I realize the difficulty in finding a satisfactory answer which provides a uniform or even a logical solution for all cases, but as they do not, in my judgment, arise in the consideration of this case, I have refrained from dealing with them.

In the result, I agree that this appeal fails, and should be dismissed with costs.

*Appeal dismissed.*
*Leave to appeal to the House of Lords.*

Solicitors for the appellants: *Wilkinson, Howlett & Moorhouse.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

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# *In re* WELSH CHURCH ACTS, 1914 AND 1919.

# *In re* TITHE ACT, 1936.

## COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES
*v.*
## REPRESENTATIVE BODY OF THE CHURCH IN WALES AND TITHE REDEMPTION COMMISSION.

[1939. W. 3475.]

*Ecclesiastical law—Church in Wales—Vesting of tithe rentcharges in Commissioners of Church Temporalities in Wales—Tithe rentcharges transferable by Commissioners to county council—Transfer postponed under statutory order—Liability to repair chancel—"Lay "impropriator"—Welsh Church Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 91).

By s. 28, sub-s. 1, of the Welsh Church Act, 1914: "Nothing "in this Act shall affect any liability to pay tithe rentcharge, or "the liability of any lay impropriator of any tithe rentcharge to "repair any ecclesiastical building, but a county council shall not, "by reason of being entitled to or receiving any tithe rentcharge "under this Act, be liable for the repair of any ecclesiastical "building."

On March 31, 1920, the date of disestablishment, tithe rentcharge belonging to the rector of a parish in Wales vested, by virtue of s. 4, sub-s. 1 (*b*), of the Welsh Church Act, 1914, in the Commissioners of Church Temporalities in Wales, who by virtue of s. 8, sub-s. 1, were ultimately to transfer all churches and certain other property to the Representative Body of the Church in Wales, and all tithe rentcharge to the Carmarthen County Council. Under a power in s. 4, sub-s. 1, of the Welsh Church (Temporalities) Act, 1919, the Commissioners postponed the transfer of the tithe rentcharge to the county council, and had not carried it out on October 2, 1936, the date under the Tithe Act, 1936, for the extinguishment of tithe rentcharge.

On a summons taken out by the Commissioners of Church Temporalities in Wales (the Welsh Commissioners) to which the Representative Body of the Church in Wales (the Representative Body) and the Tithe Redemption Commission were respondents, to determine (1.) whether or not the liability to repair the chancel of the church, formerly attaching to the ownership of the tithe rentcharge, which vested in the Commissioners on March 31, 1920, and became ultimately transferable to the Carmarthen County

Council had, before October 2, 1936, by virtue of s. 28 of the Act or otherwise by virtue of the Welsh Church Acts, 1914 and 1919, ceased to attach to the tithe rentcharge, and whether or not the tithe rentcharge had before October 2, 1936, so ceased to be subject to that liability within the meaning of para. 1 (*b*) of Part I. of the Seventh Schedule to the Tithe Act, 1936, and (2.) whether or not the Representative Body were, by reason of the provisions of the Welsh Church Acts, 1914 and 1919, precluded from receiving, pursuant to the Tithe Act, 1936, part of the redemption stock to be issued by the Tithe Redemption Commission for compensation in respect of the extinguishment of the rentcharge by that Act on October 2, 1936:—

*Held*, that the plaintiffs were not "lay impropriators" within the meaning of s. 28 of the Act of 1914 and were therefore not liable at any time for the repair of the chancel: they were entitled to receive the whole of the redemption stock issued as compensation for the extinguishment of the tithe rentcharge, and transferable, at a later date to be fixed, to the county council.

The expression "lay impropriator" is one belonging to ecclesiastical law, which was entirely abolished in Wales by the Welsh Church Act, 1914. The Act preserved the rights and liabilities of existing lay impropriators, but created no new lay impropriators. The county council was not a lay impropriator, and the proviso excepting it from liability inserted in sub-s. 1 of s. 28 was inserted therein ex abundanti cautela. The Representative Body, as the owners, were the only persons liable to repair the chancel of the church.

Decision of Morton J. (Ante, p. 301) reversed.

APPEAL from a decision of Morton J. (1) on an adjourned summons.

The summons was issued by the Commissioners of Church Temporalities in Wales (hereinafter called "the plaintiffs") to determine, on a test case, the effect of the Welsh Church Acts, 1914 and 1919, on personal liability to repair the chancels of churches in Wales. The defendants were the Representative Body of the Church in Wales (hereinafter called "the Representative Body") and the Tithe Redemption Commission. The plaintiffs were a statutory corporation created by s. 10 of the Act of 1914, and the Representative Body was incorporated by Royal Charter, pursuant to s. 13 of the Act. The question raised by the summons, was whether immediately before October 2, 1936 (the date of the extinguishment of tithe rentcharge under the Tithe Act, 1936), the plaintiffs were liable to repair the chancel of the parish church of Llanglydwen, Carmarthenshire, in the diocese of St. David's. At all material times the sole benefice in the parish was a rectory with cure of souls, and until the date of disestablishment fixed by the Welsh Church Acts, 1914 and 1919 (March 31, 1920), the Rev. Samuel Davies, as rector, was liable for the repair of the chancel. The rector died in 1922, and the question was whether in the interval between his death and the passing of the Tithe Act, 1936, the plaintiffs became liable, as "lay "impropriators" of the tithe rentcharge, for the repair of the chancel.

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(1) Ante, p. 301.

The facts and the material sections of the Welsh Church Acts and the Tithe Act, 1936, are fully set out in the report of the case below. (1)

Morton J. held that by virtue of s. 28 of the Welsh Church Act, 1914, the plaintiffs, as owners of the tithe rentcharge, became lay impropriators, and therefore liable for the repair of the chancel. The plaintiffs appealed. The appeal was heard on April 24, 25, 26, 1940.

*C. S. Rewcastle K.C.*, *Meyrick Beebee* and *R. T. E. Latham* for the appellants. The plaintiffs are not lay impropriators, and are therefore not under any liability to repair the chancel of the church, either now or in the future. It was clearly the intention of the Act that incumbents holding office were to receive the compensation payable to them under the Act by the plaintiffs, but any liability to repair the chancel is now gone: *Price* v. *Representative Body of the Church in Wales* (2); see Welsh Church Act, 1914, ss. 14 and 15 and Sch. V. So long as tithe rentcharge or an annuity in commutation of tithe rentcharge was payable to the vicar of the parish, he remained liable to repair the chancel, but on the appointed day fixed for the commencement of the Tithe Act, 1936, October 2, 1936, all tithe rentcharge was extinguished together with any liability which depended on the receipt of tithe rentcharge.

The Act of 1914, we submit, makes it perfectly plain that

(1) Ante, p. 301.

(2) [1938] Ch. 434.

when the county council became entitled to receive the tithe rentcharge, that right was to be absolutely free from any liability to repair the chancel. If the judgment appealed from be right, that has been completely defeated by taking from the county council so much of the tithe rentcharge as represents the liability to repair the chancel for ever. The fact that tithe rentcharge has not been transferred to the county council makes no difference, for it would, but for the operation of the Tithe Act, 1936, have been transferred before now. The only word in s. 28 of the Welsh Church Act, 1914, which lends support to the learned judge's decision is the word "but" introducing the proviso in favour of the county council. The word "but" can be read as equivalent to "moreover" and then the whole difficulty which the learned judge felt disappears. It may be read as "nor shall a county "council . . . ." As to the meaning of "but," see *Abbott* v. *Middleton.* (1) It is contrary to the general scheme of the Act that the Commissioners should be liable as "lay "impropriators." Impropriate tithe is tithe which has passed out of the original possession of the Church at the time of the dissolution of the monasteries or since then into the hands of lay proprietors.

They referred to *Hauxton Parochial Church Council* v. *Stevens* (2) and *Wickhambrook Parochial Church Council* v. *Croxford.* (3)

*R. F. Roxburgh K.C.* and *W. S. Wigglesworth* for the respondents. In England the repair of chancels is now a purely parochial obligation, the Ecclesiastical Dilapidations Measure, 1923, of the Church Assembly having abolished the liability of rectors and incumbents. But the measure has not affected the law applicable in Wales.

In the Court below one of the principal points argued was whether any liability remained in any one to repair church chancels. We contended that the obligation did arise, apart from any question of ecclesiastical law, but the learned judge decided against the respondents on this question.

(1) (1858) 7 H. L. C. 68.
(2) [1929] P. 240.
(3) [1935] 2 K. B. 417.

The effect of s. 3 is to abolish all such liability, and all means of enforcing it, but ss. 4 and 28 taken together restore that liability to some extent. It was assumed in the Court below that the liability remained in the case of parishes, tithe rentcharge in which had been transferred under the Act to the University of Wales. But if the university is liable, it can only be liable under s. 28, sub-s. 2.

It was not suggested in the *Wickhambrook* case (1) or any other case that a person who was only entitled to a reversionary interest in tithe rentcharge could be made liable to repair a chancel, or be admonished for not doing so.

There is nothing in the Welsh Church Act, 1914, giving the Commissioners a right of indemnity against any person or body. The Act says that nothing therein is to affect the liability of any one, as owner of the tithe rentcharge, to repair the chancel. The representative body pays the annuity to the annuitant, and they have the right to have the chancel kept in repair. The property to be transferred ultimately to the county council will be the net income of the rentcharge less any money actually spent in effecting repairs to the chancel.

It is contended by the appellants that s. 28 does not extend to any person who acquires tithe rentcharge under this Act. But on that view the proviso to the section, saying that the county council shall not be so liable cannot be explained. The principle of expressio unius exclusio alterius applies to the construction of this section.

Secondly, the liability to pay tithe rentcharge refers to any liability of the kind, whether arising under the Act or not. Thirdly, if the Welsh Church Commissioners are not liable, then lay impropriators of tithe would be most seriously affected by the Act.

Assuming, however, that the University of Wales will become liable when the tithe rentcharge is transferred to it under the Act, the effect would be that Parliament will have imposed a liability without any means of enforcing it. A

(1) [1935] 2 K. B. 417.

purchaser of tithe rentcharge from the University under s. 27 would, however, become liable.

The principle applicable is that a statute must be interpreted so as to interfere with existing rights as little as possible. The Representative Body should not be deprived of its right to have the chancels of its churches kept in repair without express words to that effect.

No reply was called for.

SIR WILFRID GREENE M.R. The Welsh Church Acts, 1914 and 1919, effected the disestablishment and partial disendowment of the Welsh Church, the date of disestablishment being March 31, 1920. That was the date which, under the Acts, came to be fixed. I do not propose to read the various sections of the Welsh Church Acts, particularly the Act of 1914, which are relevant to the question which we have to decide. I shall make particular reference to those sections which are more directly in point, but with regard to the general scheme of the Acts, so far as it is necessary to understand it in connection with the question before us, it can, I think, be summarized without taking up time by reading the sections.

The provisions of the Welsh Church Act, 1914, in regard to property which appertained to the Church in Wales, are directed to a distribution of that property in the way mentioned in s. 8. Broadly speaking, the Welsh Church Commissioners, in whom the property was vested under s. 4 of the Act, are to transfer that property, as to part, including all churches, to the Representative Body, as to part to the county councils, and as to part to the University of Wales. The partial disendowment of which I have spoken was affected by the transfer of those last two classes of properties from church ownership to lay bodies for purposes which are set out in the Act, but which do not include the ordinary ecclesiastical purposes to which that property was previously devoted. Among the property which vested in the Commissioners was, of course, tithe rentcharge in spiritual ownership. The Act was not concerned with tithe rentcharge in lay ownership. That formed no part of the endowment of the Church in Wales, and it was no part of the object of the Act to affect it in any way; it remained, as it had been since it became impropriate, in lay hands. The tithe rentcharge which was in spiritual ownership at the date of disestablishment was to be transferred to the county councils concerned. There was no doubt some tithe rentcharge which fell to be handed over to the Representative Body, that is to say, a tithe rentcharge which fell under one of the categories of property which was to be transferred to the Representative Body. I apprehend that there might have been a private benefaction, made, for instance, at some time by a lay impropriator, but I need not take up time with that, and I refer to that only to show that rentcharges of that character are not things with which we are concerned. The possibility that some such rentcharges did exist appears from the language of the Act of 1919, which, in s. 4, sub-s. 2, empowers the Welsh Church Commissioners to buy from the Representative Body any tithe rentcharge transferred to the Representative Body under the Welsh Church Act, 1914. I apprehend that that refers, for example, to a private benefaction, or something of that kind. Anyhow, we are not concerned with that. The rentcharge with which we are concerned is a rentcharge, the ultimate recipient of which is the county council. That is the scheme for the disposal of that part of the property of the Church in Wales which was laicized by these Acts.

So far as the establishment of the Church is concerned, and so far as the application of Ecclesiastical Law is concerned, s. 1 provides for disestablishment, and s. 3 provides that the Ecclesiastical Law of the Church in Wales shall cease to exist as law. Obviously the matter could not be left there, and, accordingly, there is added a statutory substitute to provide for what I may call the legal structure of the Church, which henceforward is to be based, not on Ecclesiastical Law, but upon the conception that the various members of the Church in Wales are to be bound inter se as if they had mutually agreed, and with regard to property, it is to be dealt with as though it was held on trust for persons who had so bound themselves.

One of the matters which, of course, had to be provided for in the Act was the matter of existing interests. The Act contains provisions to preserve the existing interests of the existing ecclesiastical personages and bodies, and in particular, the existing incumbents in the emoluments of the offices enjoyed. Accordingly, the Act of 1914 contains two alternative provisions dealing with the case of persons having an existing interest in tithe rentcharges. Before dealing with that, I should mention the earlier section, namely s. 14, which provides that the holder of an ecclesiastical office of freehold tenure, or equivalent to freehold, is to keep his existing interest in the emoluments of his office, so long as he holds that office, or any other ecclesiastical office, in the Church in Wales. An obvious case to which those last words are directed is the case where an incumbent leaves the benefice which he held at the time and goes to another benefice. In those circumstances, the interest which he had in the emoluments of his original benefice is preserved. The Act also provides, in s. 18, for a commutation scheme which the Representative Body is at liberty to adopt if it pleases. That scheme provides for commuting the existing interests of the holders of ecclesiastical offices in the Church in Wales in the property which is to be laicized. If that scheme is adopted, the Act of 1914 provides that the interest of any individual incumbent, if I may take that example, in the emoluments of his benefice, which would include tithe rentcharge where the tithe rentcharge is in spiritual hands, shall be replaced by an annuity, payable to him by the Representative Body. That commutation scheme, which, under the Act of 1914, was optional, became compulsory under the Act of 1919, and, accordingly, the position was that the incumbent of any given parish received, or became entitled to receive, in lieu of the emoluments attached to his benefice the annuity provided for in the scheme and ceased to have the direct interest in those emoluments as such which s. 14 of the Act of 1914 had preserved to him. Under the commutation scheme the Welsh Church Commissioners were to pay over to the Representative Body a calculated sum which was to be equivalent in value to the value of the interests which were to be commuted. That was in fact done—and we are told that the money was provided, as indeed the Act of 1914 contemplates that part of it, at any rate, should be provided, out of moneys provided by Parliament, and we are told that the Welsh Church Commissioners have charged in favour of His Majesty's Treasury the property remaining vested in them as security for that loan. The result of that was, with regard to the particular tithe rentcharge with which we are concerned, namely, the tithe rentcharge which the Rev. Samuel Davies, before the Acts came into force, was receiving as spiritual rector of the parish of Llanglydwen, remained vested in the Welsh Church Commissioners. The existing interest of the Rev. Samuel Davies in that rentcharge had gone—(I am speaking now of the time before that reverend gentleman died)—and he became entitled, under s. 18 of the Act of 1914, to receive the appropriate annuity which would be provided to him by the Representative Body out of the moneys which the Welsh Church Commissioners paid to them under the commutation scheme. Ultimately the tithe rentcharge appertaining to this particular parish would fall to be transferred to the county council, unless, of course, under the powers of management which the Welsh Church Commissioners have, it had been sold in the meanwhile.

It is important to bear in mind the matters to which I have referred in approaching the consideration of the specific question which is before us. That question relates to the liability to repair the chancel of the parish church of Llanglydwen. Before the passing of the Act, that liability lay upon the incumbent who was the owner of the tithe rentcharge which had remained throughout in spiritual hands and had never become disassociated from the spiritual rectory. In that capacity he was unquestionably under the common liability to repair the chancel of the parish church. Leaving aside for a moment the operation of the commutation scheme, that particular liability was destroyed by s. 3, sub-s. 1, of the Act of 1914. It was a liability existing under Ecclesiastical Law, and Ecclesiastical Law alone, so far as Wales was concerned, and as soon as that law ceased to exist as law, the legal obligation which lay upon the incumbent ceased as such to exist; but there was substituted for it by sub-s. 2 what, for brevity, I may call the quasi contractual obligation enforceable in the temporal courts. Accordingly, if the matter had stood there, the position of the incumbent on disestablishment would have been that he would have retained during his life his existing interest in the tithe rentcharge which formed part of the emoluments of his benefice. But whereas the original liability under Ecclesiastical Law had gone, he would have been compellable to keep the chancel in repair in the temporal courts under sub-s. 2. As matters turned out, however, the situation was a different one, because the Rev. Samuel Davies became entitled under the commutation scheme to an annuity calculated in accordance with that scheme in lieu of his previous interest in the property appertaining to the benefice, including the tithe rentcharge; and the obligation to maintain the chancel in repair is imposed upon him by para. (*g*) of s. 18—it is imposed upon him as annuitant under the commutation scheme—and by the joint operation of that paragraph and sub-s. 2 of s. 3, the liability so imposed upon him can be enforced in the temporal courts as though he had contractually bound himself. That was the situation down to November 20, 1922, which was the date upon which the Rev. Samuel Davies died. Throughout that time, as it has so happened, the tithe rentcharge in question which was vested in the Welsh Church Commissioners under s. 4 of the Act has remained vested in them, and so far as can be foreseen, it will remain vested in them for a considerable time, or rather, would have remained so vested but for the passing of the Tithe Act, 1936. The result of this is that the ultimate transfer of the redemption stock substituted for that tithe rentcharge by the Tithe Act, 1936, to the county council has been postponed, and will continue to be postponed until the machinery in operation allows the transfer to take place.

The situation consequent upon that state of affairs is, I think, truly that the entire interest in the tithe rentcharge and the redemption annuity has been, and remains, vested in the Welsh Church Commissioners, and will remain so vested until they transfer it to the county council, or to a purchaser.

if by any chance it were to be sold. Since the death of the Rev. Samuel Davies there has been in existence no annuitant under the commutation scheme. The commutation scheme being designed to deal with existing interests, as soon as a person holding such an interest dies, the scheme has served its purpose, so far as his interest is concerned, and drops out of the picture, and in consequence, there being no annuitant to defray the cost of the repair of the chancel, the question arises : Has there, since the death of the Rev. Samuel Davies, been anybody under a legal liability to effect those repairs ? I think it fair to say that the Act of 1914 was contemplating that the transfer of tithe rentcharge to county councils would, in all probability, not be long deferred. The Act contemplated the case where such a transfer would take place during the lifetime of the holder of an existing interest, and it made provision for the way in which the holder of such an interest was to have his financial position, in substance, preserved, notwithstanding that the county council had received a part of the original emoluments of the benefice. It is beyond question that when a county council has transferred to it tithe rentcharge (or the redemption annuity) under the Act, that county council is not subject to any liability for the repair of the chancel of the parish church, and the result is that the original liability which lay upon the spiritual owner of that rentcharge disappears altogether.

To summarize the matter, it would work in this way. Before the Act, the liability was enforceable in the Ecclesiastical Courts, and after the Act, so long as the existing incumbent held his interest in the tithe rentcharge as such, the liability would have been enforceable in the temporal courts on a quasi contract. Upon the death of such an incumbent, if the tithe rentcharge had, in the meanwhile, been transferred to the county council, all liability of every kind in respect of the repair of the chancel would have disappeared, and if it was desired to keep the chancel in repair, the persons to do it would be the Representative Body, who, under the Act, became the owners of the churches, and the money necessary to provide for it would have to be found amongst such funds as they could provide.

The question before us is of this nature. When the Rev. Samuel Davies died, and the commutation annuity which he had received thus came to an end, and with it his liability in respect of repairs, was there a liability, and is there to-day a liability, and will there continue to be a liability, in the Welsh Church Commission, as owners of that tithe rentcharge (or the redemption stock), to repair the chancel? Their position, if I may examine it quite shortly, is, I think, this. I have already said that, in my view, the right to the tithe rentcharge and the redemption stock vested in them, and continues to remain vested in them. The provisions of s. 3, sub-s. 1, destroy the obligation which previously attached to the owners of the rentcharge under Ecclesiastical Law. The substituted quasi contractual obligations under sub-s. 2 are not applicable to the case of the Welsh Church Commissioners as owners of the rentcharge because they are not members of the Church in Wales. Accordingly, it would appear, if the matter had stopped there, that in the events which have happened, that is to say, the commutation scheme having become effective, and the tithe rentcharge having vested in the Welsh Church Commissioners freed from the existing interest of the incumbent, the obligation which previously attached in respect of that rentcharge has disappeared—and, indeed, down to this point one can see no reason on earth why it should not have disappeared. The ultimate transferees, the county council, are to take it free of any such obligation. The existing incumbent, during his life, as recipient of an annuity under the commutation scheme, has imposed upon him the liability to repair, and that liability is enforceable by the proper machinery—and I cannot see why, in that state of affairs, the Act should have provided for the survival of a liability in the Welsh Church Commissioners as the persons in whom the tithe rentcharge is vested during this period. The Welsh Church Commissioners are, of course, persons who have no beneficial interest in these matters at all; they are brought into existence merely as a piece of machinery to carry out certain executive functions in connection with what was obviously a very complicated situation, and the property which vests in them, vests in them for the purpose, and the sole purpose, of enabling that property to be properly administered for the purposes of the Act and to be transferred at the end to the persons whom the Legislature has decided should receive it.

Taking, first of all, the period down to the death of the Rev. Samuel Davies, it is said, on behalf of the Representative Body, that the true position is of this nature, that during that period the Rev. Samuel Davies was liable to repair the chancel as the recipient of the annuity under the commutation scheme. It is also said that concurrently with that liability there was a liability upon the Welsh Church Commissioners as the persons in whom the tithe rentcharge was vested. Why the Legislature should have gone out of its way to provide for two liabilities of that kind I am at a loss to understand. I am still more at a loss to understand why, if they did so, they should not have provided that the primary liability should fall upon the incumbent. No such provision is to be found, nor can I find any provision, under which the Welsh Church Commissioners, if it was attempted to enforce this alleged liability against them, could obtain indemnity from the incumbent. No doubt, if that were the true legal position, that problem might have been solved in practice during the lifetime of the incumbent by the Representative Body enforcing against him, in the first instance, the liability to repair. But the question we have to decide brings out the point in a practical form, because the incumbent is now dead. It is said that the liability of the Commissioners, which has been in existence throughout, is now a sole liability and that the Representative Body is, accordingly, entitled to call upon the Commissioners to execute the repairs in question. As I have said, if the matter merely rested upon s. 3, in whatever way one regarded the nature of the ownership of the Welsh Church Commissioners, that ownership would not have carried with it any enforceable liability. The liability under Ecclesiastical Law has gone, and the substituted liability in the temporal courts does not apply to the case. That difficulty, it is said, disappears by force of one section in the Act, and one section only, namely s. 28, and as it is upon the language of that section that the whole argument in the last resort depends, I will read it. Sect. 28, sub-s. 1, is as follows: "Nothing in this Act shall affect any liability to pay tithe "rentcharge, or the liability of any lay impropriator of any "tithe rentcharge to repair any ecclesiastical building, but "a county council shall not, by reason of being entitled "to or receiving any tithe rentcharge under this Act, be "liable for the repair of any ecclesiastical building." Then: "(2.) Such liability as aforesaid of a lay impropriator may "be enforced in the Temporal Courts at the instance of the "Representative Body in like manner as if such liability "arose under a covenant made with the Representative Body "and running with the tithe rentcharge." That provision applies, and unquestionably applies, to the case of a person who, at the date when the Act became effective, was the lay impropriator of tithe rentcharge, and as tithe rentcharge in such ownership was not to be taken away by the Act from its owner, it was obvious that the liability which attached to it in respect of chancel repairs should remain where it was—otherwise the Act would have made a present to the lay impropriator for no reason at all. The position, therefore, with regard to such a lay impropriator would appear to be this. He, of course, is not affected by the quasi contractual scheme in sub-s. 2 of s. 3, because the property which he holds in his hands is outside the Act altogether. But in order to ensure that there shall be a readily enforceable liability upon him, sub-s. 2 provides for a liability arising under a notional covenant. That, therefore, is the way in which the lay impropriator has imposed upon him a suitable liability in respect of the obligation to repair the chancel of the parish church. It is said that the provisions of s. 28 are not confined to persons who were lay impropriators at the time when the Act became effective, but that the expression "any lay "impropriator" in the section includes the Welsh Church Commissioners. It is essential for the argument of the

Representative Body to be able to establish that proposition, and if they cannot establish it, any liability to repair the chancel must have gone, so far as the Welsh Church Commissioners are concerned. To that argument there appeared to me to be a solid phalanx of objections. First of all, if the Welsh Church Commissioners are to be properly described as "lay impropriators," it is by this Act, and by this Act alone, that they have acquired that status. The expression "lay "impropriator" is a well known and ancient expression, and that, and the corresponding word "impropriate," and the word "appropriate," constituted a terminology suitable to describe the position in an established and endowed church. One effect of the Welsh Church Acts is to sweep away the whole of the conception of lay impropriators, or spiritual impropriators, of tithe rentcharge. Save in the one case of the existing lay owners of tithe rentcharge, that terminology has no relevance and no suitability to the new state of affairs which these Acts are bringing about. Therefore, it would be very extraordinary if the Legislature had used phraseology of that kind as applicable to a body which is brought into existence by the very Act which makes phraseology of that kind completely useless for the future. I say that merely as a preface to the other objections which appear to me to be quite conclusive.

First of all, sub-s. 1 begins with the words: "Nothing in "this Act shall affect any liability." In other words it is framed as a saving clause. If the section was intended to apply to somebody who became a lay impropriator by virtue of the Act itself, and by virtue of the Act alone and for the purposes of the Act, I cannot imagine any phraseology less suitable than the words: "Nothing in this Act shall affect "any liability," because it is the Act itself which creates the liability in that person; it is the Act itself which clothes that person, according to the argument, with the character of lay impropriator. Indeed, taking the first part of the sub-section by itself, apart from the reference to the county council, I should have thought that it was not really open to argument that the phrase "any lay impropriator" in sub-s. 1 could not apply to the Welsh Church Commissioners. The whole strength of the argument lies in the fact that the sub-section goes on to say " but a County Council shall not, "by reason of being entitled to or receiving any tithe rent-"charge under this Act, be liable for the repair of any "ecclesiastical building." It is said, and it is a perfectly legitimate argument, that that reference to the county council shows that if the reference had not been there the county council would have been under such a liability, and, moreover, would have been lay impropriators. If that be not so, it is said: What is the point of the reference to the county council and why introduce that reference by the word " but," which, in its ordinary grammatical significance, indicates a qualification of what has gone before, namely, the general reference to lay impropriator? On that basis, it is said, it is impossible to confine the words " any lay impropriator " to persons who were lay impropriators when the Act came into force; that the words must extend to county councils and that, if they extend to county councils, they must extend to the Welsh Church Commissioners. I am not going to suggest that this sub-section is artistically drafted. It is quite fair to say that this reference to the county council is one which introduces an element of apparent doubt. But we have to construe the Act as a whole, and we have to construe the section as a whole. I have already pointed out that the opening words of the section are completely inappropriate to produce the result suggested. I have pointed out some respects in which the scheme of the Act and the express provisions of the Act are clearly directed to getting rid of this liability altogether and substituting the liability on the annuitant under the commutation scheme so long as he shall be alive. There are certain other matters to which I shall refer presently, all of which seem to me to point in the same direction. The conclusion to which I have come, and to which I find myself forced to come, by these considerations is that the reference to the county councils in this sub-section is put in—and perhaps in this particular piece of legislation, with its long history of political controversy behind it, it is not surprising to find that it should have been put in—ex abundanti cautela in order that in express terms, and in the clearest possible manner, one of the objects to which Welsh disestablishment had always been directed should be clearly and specifically provided for. I say it does not surprise me to find in this particular piece of legislation that particular provision inserted ex abundanti cautela. It is perhaps fair to say that prima facie one does not construe the language of an Act of Parliament as inserted ex abundanti cautela. But if one is compelled so to construe it by the general tenor of the Act and the context, it is perfectly legitimate and indeed necessary so to construe it.

If it be not so construed, there results, as it appears to me, to be a position of the utmost capriciousness. It so happens that this particular tithe rentcharge (or the redemption stock) has not yet been transferred to the county council. The reason why that has not been done is because the administration of the Act has taken a long time and will take a long time yet. But given the necessary consent of the Treasury, if it be necessary, and given an administrative situation which would enable it to be done, there is nothing in the world to prevent the Welsh Church Commissioners transferring the redemption stock substituted for this tithe rentcharge to the county council to-morrow. They might have done it, if similar circumstances had existed, a year ago. In that case the liability would admittedly have disappeared. Why should it be that this tithe rentcharge, which, in the beneficial hands into which it is ultimately to come, is to be exempt from any such liability, should remain under such a liability while it is in purely administrative and executive hands ? The whole question as to whether the Representative Body could secure the repair of these chancels by means of tithe rentcharge would depend upon what might be a purely fortuitous circumstance, namely, whether or not at any given moment the tithe rentcharge had been transferred to the county council.

But the matter does not rest there. The argument involves, as I have already said, the co-existence of two liabilities so long as the annuitant was alive, the one a liability based on a notional covenant under s. 28, and the other the liability of the annuitant based on a notional contract between himself and the other members of the Welsh Church under s. 3, sub-s. 2, liabilities of a different character based on a different legal conception, with no provision in the Act by which the person under one liability is to have a right to be indemnified by the person under the other liability. I cannot conceive that the Legislature would have brought about a situation of that kind.

There are two other points to which I may call attention, and one arises under s. 27. Under that section the Welsh Church Commissioners and any local authority have power, with certain consents, to sell property vested in them by or under this Act. Accordingly the county council after this tithe rentcharge (or rather the redemption stock) has been transferred can, at some future date, if it obtains the necessary consent, sell it to a purchaser. The argument on behalf of the Representative Body is, and must be, that, not merely the Welsh Church Commissioners but the county council are lay impropriators within the meaning of s. 28, the county council being exempted from the liability which otherwise would have attached to that status by reason of the express provisions in sub-s. 1 which exempts them from that liability. When the county council sells to this purchaser tithe rentcharge of which they are lay impropriators, the purchaser himself, when he acquires the tithe rentcharge, is a lay impropriator. He is not exempted by the express exemption in s. 28, sub-s. 1, because that is confined to county councils. The curious result, therefore, follows that this liability to repair the chancel remains alive and effective, according to the argument, up to the transfer to the county council, and then goes into retirement during such time as the tithe rentcharge remains vested in the county council, and as soon as they sell it to the purchaser it emerges from its retirement in full vigour and effectiveness. Parliament has the right to be capricious, but I must decline to construe the provisions of this Act of

Parliament in a way which would produce caprices of that kind, when I can find a perfectly sensible and perfectly logical, reasonable and convenient method of construing the Act which will not lead to those consequences, but which will produce a harmonious and consistent result.

I may refer to one further point which appears to me to lead in the same direction. Under s. 18, which is the commutation section, the Welsh Church Commissioners are under a liability to pay over to the Representative Body the aggregate value of the existing interests, and pending payment of that sum they are to pay interest upon it. Para. (*d*) of the section empowers the Representative Body to call upon the Welsh Church Commissioners to make payments from time to time on account of the sums payable to the Representative Body, but the limit up to which they can call upon them to make such payments is the amount then received by or due to the Welsh Church Commissioners as income from the property vested in them and to be by them transferred to the University of Wales and the county councils. If this argument be right, if a request of that character is made to the Welsh Church Commissioners, the Welsh Church Commissioners would be entitled to say: " We have received in respect of income of "tithe rentcharge which is to be transferred to the County "Councils £X, but out of that £X we are liable to repair the "relative chancels throughout Wales. You, the Representa-"tive Body, cannot call upon us to make a payment of the "amounts which we have collected in respect of these tithe "rentcharges without, at the same time, allowing us to ensure "that we are not paying away to you money which we ought "to spend on the repair of the chancels throughout the "Principality." There is not a suggestion in para. (*d*) that anything of the kind has to be taken into calculation, and, indeed, if anything of the kind had to be considered, it seems to me that the Welsh Church Commissioners could never be called upon to pay money over under that clause unless they had satisfied themselves as to the state of repair of the chancels in the churches in the parishes in respect of which the various tithe rentcharges were received. That is only an indication which seems to me to strengthen the view which I have formed, if indeed it is required for that purpose.

I think that I have explained sufficiently fully the reasons which have caused me to differ from the judgment of Morton J. It is not out of any disrespect for him that I refrain from examining the reasoning which led him to the conclusion to which he came, because my reasons for differing from him sufficiently appear from what I have said.

I conclude these observations by referring to one matter which was very vigorously pressed upon us by Mr. Roxburgh, and which, indeed, formed almost the linchpin of his argument. It was said that if we decide this appeal in the way in which, in my opinion, it ought to be decided, we should by implication be deciding that episcopal and capitular tithe which apparently—I say "apparently" because the matter has not been gone into or argued—goes to the University of Wales, did not carry with it the pre-existing liability in respect of chancel repairs, and that, accordingly, not merely are the Welsh Church Commissioners now, but the University of Wales when it receives the redemption stock substituted for those tithe rentcharges will be free of any such liability. I do not myself find that it is necessary or helpful to consider what may be the legal position with regard to the episcopal or capitular tithe. If I found myself forced to consider that matter, before I could justly construe the Act in relation to the particular subject-matter before us, I should, of course, be bound to take it into consideration. But I do not find anything which compels me to examine, for the purposes of this decision, a matter to which different considerations may well apply and which is not affected by the particular set of words with which we have here to deal, because what we have to deal with here is the tithe rentcharge which goes with the benefice to the spiritual rector, and we have to construe the section in the light of the reference to the county council which appears in it, a reference which, of course, has nothing in the world to do with the University of Wales. If and when that question as to the episcopal and capitular tithe comes up for consideration and decision, it must be decided. But it must not be understood from anything I have said that

I am expressing any opinion whatsoever upon that subject.

In the result, in my opinion the appeal succeeds and the appropriate declarations on that basis must be made.

MACKINNON L.J. I agree. The entire structure of the argument for the respondents rests upon the attribution of a particular meaning to the words "any lay impropriator of any "tithe rentcharge" in s. 28. Obviously those words are apt to designate the ordinary and well known lay impropriator of tithe rentcharge in existence before the passing of this Act—very likely a college, or possibly a private person. But Mr. Roxburgh seeks to say that in addition to that obvious meaning the phrase also includes any person or body who, by virtue of the provisions of this Act, becomes the assignee or transferee of any tithe rentcharge. Mr. Roxburgh was quite logical in asserting that he was entitled to make that addition to the meaning of the phrase and to carry it to its furthest extent, because when he was driven to do so he did not shrink from saying that if the county council assigned or sold a tithe rentcharge to an investor, that investor would, in his turn, become a lay impropriator within the meaning of this phrase. The radical fallacy, to my mind, of that argument for the respondents is the attempt to include in the definition of "lay "impropriator" a body or person who, by virtue of the provisions of this Act, becomes the assignee of the tithe rentcharge. For the true view, I think, is that "lay impropriator" in this section means one who is a lay impropriator of a tithe rentcharge at the date of the Act and outside its provisions altogether. That being so, it is quite unnecessary for me, after hearing the elaborate judgment of the Master of the Rolls, to canvass the matter further.

I agree that this appeal ought to succeed.

CLAUSON L.J. I agree, and notwithstanding the importance of this case, I do not feel that any purpose would be served by my burdening the pages of the Law Reports with a repetition of an argument which could only be based on the same lines, and which could only reach the same conclusion, as the arguments which have been stated in the judgment of the Master of the Rolls and that of my brother Lord Justice MacKinnon.

I accordingly agree that this appeal should be allowed.

The declaration was made as follows: "That the liability for "the repair of the chancel of the Parish Church of Llanglydwen "in the County of Carmarthen formerly attaching to the "ownership of the Tithe Rentcharges of 100*l.* per annum which "before the 31st March 1920 belonged to the Rectory of the "said Parish but which on that date by virtue of Section 4 of "the Welsh Church Act 1914 vested in the Plaintiffs and by "virtue of Section 8 (1.) (*c*) of that Act became transferable by "them to the Council of the said County of Carmarthen had "before the 2nd October 1936 by virtue of Section 28 of that "Act or otherwise by virtue of the Welsh Church Acts 1914 "and 1919 ceased to attach to the ownership of the said Rent-"charges and that the said Rentcharges had before the "2nd October 1936 so ceased to be subject to such liability "within the meaning of paragraph 1 (*b*) of Part 1 of the Seventh "Schedule to the Tithe Act 1936 and (2.) that the Defendants the "Representative Body of the Church in Wales are by reason of "the provisions of the Welsh Church Acts 1914 and 1919 pre-"cluded from receiving pursuant to the Tithe Act 1936 any "part of the Redemption Stock to be issued by the Defendants "The Tithe Redemption Commission for compensation in "respect of the extinguishment on the 2nd October 1936 of the "said Rentcharges by the said Act."

*Appeal allowed.*

Solicitors: *A. H. R. Primrose; Milles, Jennings White & Foster; A. D. Stocks.*

H. L. L.

# *In re* EVANS.

## HEWITT *v.* EDWARDS AND OTHERS.

FARWELL J.

1940 April 18.

[1939. E. 1588.]

*Will—Forfeiture clause—" . . . . any child or grandchild . . . . " who may at any time become a convert to the Roman Catholic " religion, shall thereupon ipso facto forfeit the right to any income or " capital . . . ."—Testator's daughter baptized according to rites of Roman Catholic Church after date of will but before testator's death —Person incurring forfeiture to have some right determinable immediately on conversion—No forfeiture by daughter.*

A forfeiture clause in a will provided: " I declare that any " child or grandchild of mine who may at any time become a " convert to the Roman Catholic religion shall thereupon ipso " facto forfeit the right to any income or capital in my trust " estate," and prescribed the destination of shares so forfeited. After the date of the will but before the testator's death, one of his daughters married a Roman Catholic and was baptized according to the rites of the Roman Catholic Church. Also before his death, the only child of the marriage, a girl, was born, and a day or two later was baptized according to those rites.

On a summons to determine whether the daughter had forfeited her right to a share of income in the testator's residuary trust estate and, if so, for what persons and on what trusts any such forfeited income, and the capital producing it, ought to be held:—

*Held*, (1.) that, in the present case, the baptism into the Roman Catholic Church of a person becoming a convert to the Roman Catholic religion was an act which the Court could ascertain with certainty and which would, in a proper case, create a forfeiture. *In re Blaiberg* (ante, p. 385) considered and distinguished.

(2.) that the words " ipso facto " in the forfeiture clause showed that the person forfeiting was to have, at the moment of forfeiture, a right determinable immediately on conversion to the Roman Catholic religion: and that the clause therefore necessarily contemplated that the testator would be dead at the date of forfeiture.

(3.) that the daughter, having been converted to the Roman Catholic religion before the testator's death, had not forfeited her right to the share of income: and that the granddaughter's interest in the testator's estate had not been forfeited.

ADJOURNED SUMMONS.

By his will dated April 20, 1906, William Parry Evans (hereinafter called " the testator ") gave devised and bequeathed all his property, estate and effects to his trustees on trust for sale and conversion as therein mentioned, and on trust to pay the income of the estate to his wife for life and after her death to stand possessed of the estate in trust for all his children or any his child who should attain the age of twenty-one years, if more than one in equal shares. Clause 8 provided that if any child should die having attained a vested interest without leaving a child or children who should succeed to his, her or their parent's share under the trusts, that share was to be for the general testamentary appointees of that child and, in default of appointment by that child, was to accrue to the testator's other children's shares on the like settlement trusts as affected his or her original share.

Clause 12 was: " I declare that any child or grandchild "of mine who may at any time become a convert to the "Roman Catholic religion shall thereupon ipso facto forfeit "the right to any income or capital in my trust estate and "that upon any child becoming such a convert his or her "share shall immediately pass by way of accretion to the "share of my other child or children and in the case of a "grandchild becoming such a convert his or her share shall "pass by way of accretion to his or her brothers or sisters "or if there should be no such brother or sister then subject "to the life interest if any of any son or daughter of mine "in such share to the person or persons who would become "entitled thereto on the death of the grandchild becoming "such convert."

On August 24, 1920, Doris Haselden Evans, a daughter of the testator (hereinafter called " the daughter "), married John Denis Edwards, a Roman Catholic, and, on May 14, 1922, was baptized according to the rites of the Roman Catholic Church. The only child of the marriage, Josephine Mary Edwards (hereinafter called " the granddaughter "), was born on February 9, 1921, and a day or two later baptized according to the rites of the Roman Catholic Church.

The testator died on August 29, 1922, leaving seven children him surviving. His wife died on March 11, 1939, whereupon his trust estate became divisible among his children. By this summons taken out on November 27, 1939, Mr. Norman Sinclair Hewitt, one of the trustees of his will, asked whether the daughter had forfeited her right to a share of income in the testator's residuary trust estate and, if so, for what persons and on what trusts any such forfeited income, and the capital producing it, ought to be held.

*A. C. Nesbitt* for the trustee.

*Donald H. Cohen* (for *Andrew Clark* on war service) for the daughter and granddaughter. There has been no forfeiture, because the daughter's having become a Roman Catholic after the date of the will, but before the testator's death, is not an event contemplated by the testator as causing a forfeiture. The will speaks from death, and the condition as to forfeiture is void for uncertainty. A share cannot " pass " unless it has become something to which the beneficiary is entitled. All these considerations point to an interpretation similar to that in *In re Chapman.* (1) In the events which have happened, no forfeiture would have been incurred even if the forfeiture clause had been good : but it is bad, because it is too uncertain for the Court to act upon. [He referred to *In re Blaiberg.* (2)] The question whether a person is a convert to the Roman Catholic faith depends on the person's state of mind. That is something which the Court will not investigate. Therefore, a condition of forfeiture which depends on a state of mind is too uncertain for the Court to act upon.

*B. G. Burnett-Hall* (for *A. L. Ungoed-Thomas* on war service) for the testator's other children. There has been a forfeiture. There is no decision which takes this will out of the general rule. The words " who may at any time become a convert " are the widest possible words that the testator could have used. [He referred to *In re Hewitt.* (3)] It is quite clear that the will could take effect only from the moment of the testator's death. The words can quite properly be applied to the state of facts occurring at that moment : and at that moment the state of facts is that there is a child who has

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(1) [1904] 1 Ch. 431 ; [1905] A. C. 106.

(2) Ante, p. 385.

(3) [1926] Ch. 740.

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become a convert to the Roman Catholic religion and who thereupon ipso facto forfeits all right to income and capital.

Farwell J. [after stating the facts :] The first question with which I am dealing at the moment, is whether the daughter has forfeited her life interest under the will because she was admitted during the testator's lifetime into the Roman Catholic Church. It has been argued on her behalf that in this case the forfeiture clause cannot take effect, and it has been put on two grounds. First, it is said that the event, that is, the daughter's becoming a convert to the Roman Catholic Church, happened in the testator's lifetime and that there are in the will indications that the testator was contemplating a forfeiture only in the event of a child of his becoming such a convert after his death. Secondly, it has been argued that the forfeiture clause is void for uncertainty.

I will deal first with the second argument. In support of the argument that in this case the forfeiture clause is void, a recent decision of Morton J. in *In re Blaiberg* (1), following a decision of my own, has been cited. In that case the forfeiture was to operate if a child or grandchild married any person not of the Jewish faith. Morton J. held that the forfeiture clause in that case was void for uncertainty. I think that he there founded his decision upon a decision of my own on a question which arose under the same will but under a different codicil to it. In his judgment he read a passage from the judgment in the case which I decided. I should like to refer again to that passage quite shortly. In it are these words, which were in my judgment : " In construing the clause, it "must be borne in mind that this is a forfeiture clause, and, "as such, must be construed strictly, but it must not be held "invalid merely because it is a forfeiture clause, if the Court "is satisfied that it is a certain clause. Now what exactly "is meant in a case of this sort is, I think, illustrated and "explained quite plainly in a recent judgment of Lord Romer "in the Privy Council, in the case of *Sifton* v. *Sifton.* (2)

(1) Ante, pp. 385, 389. (2) [1938] A. C. 656, 670.

"I do not think it is necessary for me to do more than refer "to one passage in that judgment. Lord Romer says: 'In "' *In re Sandbrook. Noel* v. *Sandbrook* (1) Parker J. stated "' the principle in these words: " conditions subsequent, in "' "order to defeat vested estates, or cause a forfeiture, must be "' "such that from the moment of their creation the Court "' "can say with reasonable certainty in what events the "' "forfeiture will occur." In *In re Viscount Exmouth.* "' *Viscount Exmouth* v. *Praed* (2) Fry J. used the following "' language: " the condition must be clear and certain. "' "That, in my opinion, includes, not only certainty of "' "expression in the creation of the limitation, but also "' "certainty in its operation. It must be such a limitation "' "that, at any given moment of time, it is ascertainable "' "whether the limitation has or has not taken effect." '" Morton J. then said: " After a further quotation from the "speech of Lord Romer in that case, Farwell J. continues: "' Now, as I understand that, it is this: a forfeiture clause "' is not necessarily void because a person may not be able "' to know whether the thing which he is doing or is proposing "' to do will necessarily create a forfeiture, but, on the other "' hand, it must be such a condition that the Courts at all "' times can say definitely or not that that which has been "' done amounts to a forfeiture or does not amount to a "' forfeiture, as the case may be.' Farwell J. then turns to "the words of the clause which he was construing, and adds: "' In my judgment, the Court must be in a position to say "' whether or not some particular act does or does not create "' a forfeiture.' He then considered the clause which he had "to construe in more detail, and he made these, among other, "remarks on it: ' It seems to me that the phrase " cease or "' " fail to profess " is a term capable of many meanings, and "' it would be impossible, in my judgment, in many cases to "' determine with any certainty whether a person had or had not "' ceased or failed to profess. Whether a person who, while "' outwardly professing to be a member of the religion, in fact was "' not a member of it, would forfeit under this clause, I know

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(1) [1912] 2 Ch. 471, 477.

(2) (1883) 23 Ch. D. 158, 164.

"'not, and it would, I think, be impossible to ascertain.'" Then Morton J. says: "As I read that observation, Farwell J. "is saying: It is really impossible to ascertain whether a "person in fact, in his own mind, holds a particular religious "belief. It is not a matter which the Courts can ascertain "with certainty."

It is said that that decision of Morton J. and of my own is authority for saying that in this case the forfeiture clause is void for uncertainty. I cannot accept the view that these two cases are really comparable. The ground upon which I came to the decision which I did in *In re Blaiberg* (1) and, I think, the ground upon which Morton J. based his decision, was that there the forfeiture clause was contemplating a state of mind and that that was something which the Court could not ascertain with any certainty. It was not a particular overt act such as definitely accepting a faith other than your own and renouncing the faith which you originally held. The forfeiture clause in *In re Blaiberg* (1) contemplated merely that, if a person married someone who did not profess the Jewish faith, there was to be a forfeiture. Whether there would be sufficient compliance with the condition of "professing the Jewish faith" merely by the particular person's attending synagogues, or doing other acts possibly suggestive, but not necessarily conclusive, of his professing that faith, was so uncertain that there were grounds there sufficient to render the forfeiture clause invalid. But in the present case it does not seem to me that that is the position. A person becoming a convert to the Roman Catholic faith must do definite acts and must be admitted into the Roman Catholic Church. Before being admitted into the Roman Catholic Church, such a person must renounce the religion which he or she had before, and, before becoming a convert, is baptized, perhaps conditionally, into the Roman Catholic Church and is given a name on that baptism.

There is, in my view, in this case no difficulty in the Court's ascertaining for itself whether a person has become a convert or not. Once the person has been admitted into

(1) Ante, p. 385.

the Roman Catholic Church the forfeiture operates (assuming it to operate at all) and no change of mind or failure to continue to be a Roman Catholic can affect the forfeiture which has taken place once and for all by the definite act of being received into the Roman Catholic Church. It is not a case, here, of a person's "professing "the Roman Catholic religion," whatever that may mean: here there is contemplated, in my view, a definite overt act enabling the Court to say that a person is no longer a member of the Church of England (or whatever the church was to which that person formerly belonged) and has become a member of the Roman Catholic Church. That is an act which, in my judgment, can be ascertained with certainty and will in a proper case create a forfeiture.

I now turn to the first ground upon which the case was argued and, in my judgment, there is very much greater force in that argument than in the other one. (It is quite true that, prima facie, the will speaks from its date and, in order to give it another meaning, one has to find in the will itself an expression indicating with reasonable certainty that the testator was contemplating that in the case of a forfeiture the act which should cause the forfeiture should be done in the future, after his death, and not between the date of the will and the date of his death. I turn now to the clause in this particular case. The clause contains the words: " . . . . any " child or grandchild of mine who may at any time . . . ." On behalf of the other children great stress has been laid, quite rightly, on those words " at any time." Prima facie, standing alone, they would, I think, indicate clearly that the testator was contemplating an act which might be done at any time, not only after his death but before it. The clause continues: " . . . . become a convert to the Roman Catholic " religion shall thereupon ipso facto forfeit the right to any " income or capital. . . . ."

In my judgment, the words " ipso facto " are of considerable force here, because they clearly contemplate that the person is to be in possession of some right which is to determine immediately upon the happening of the particular event,

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namely, the conversion to the Roman Catholic religion. If the act referred to in this clause is an act which has happened before the testator's death, the person who has done the act cannot "ipso facto" forfeit the right, because at that time there is no right to forfeit: and, in my judgment, the conclusion to which one should come on reading this clause as a whole is that the testator is contemplating an event which is to cause a forfeiture which would happen after his death, that is to say, after the child has become entitled to something under his will which that child can forfeit. Reading the clause as a whole, I think that it does point to this: that the testator was contemplating that, after his death, any child of his who took the step of becoming a convert to the Roman Catholic faith should be deprived of that which that child enjoyed up to that moment. Until the testator's death there was nothing which the child enjoyed of the testator's estate. The clause necessarily contemplates that the testator will be dead, and that the estate will have become vested in the persons who take under his will, whether it be a reversionary interest or an interest in possession. Whatever the interest is which the person takes, that is to be forfeited ipso facto by the conversion to the Roman Catholic faith. There is, however, in my judgment, nothing which can operate so long as the testator is alive and has left his will in the way in which it has been drawn. There is no evidence of the matter, but if he knew that his child had become a Roman Catholic and he desired to deprive that child, or any issue of hers, of any interest under his will, it could easily have been done by a new will or a codicil. However, he does not do that. He leaves his will in terms which, in my judgment, on their true construction, do not operate to cause a forfeiture by reason of conversion to the Roman Catholic religion before the testator died.

Consequently, on this ground, I have come to the conclusion that the testator's daughter has not forfeited her interest. The best course is to declare that the daughter has not forfeited her right to her share of income of the testator's estate, and to include the granddaughter in the declaration. It may save further questions if I make a declaration covering them both.

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The costs of all parties as between solicitor and client must come out of the residue.

Solicitors: *Pennington & Son; Gustavus Thompson & Sons, for William Roche & Sons, Dublin.*

K. R. A. H.

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# SOHO SQUARE SYNDICATE, LIMITED *v.* E. POLLARD AND COMPANY.

[1939. S. No. 3961.]

*Mortgage—Emergency legislation—Receiver—Appointed with mortgagor's consent—Waiver of statutory provisions—Leave of Court not applied for—Validity—Public policy—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2.

The provisions of the Courts (Emergency Powers) Act, 1939, preclude a mortgagee from appointing a receiver of the mortgaged property without the leave of the Court, even though the mortgagor has given his consent to the appointment.

WITNESS ACTION.

In 1937 Commander Charles Rodney St. John Rich, R.N., became the owner of Nos. 23, 24 and 25, Soho Square, London, and after entering into an arrangement with a firm of builders for the rebuilding of the premises, executed a mortgage of the property to them to secure the cost of the rebuilding of the property.

Soho Square Syndicate, Ld., was subsequently formed, and Commander Rich became a director and chairman of the board of that syndicate.

On May 11, 1937, he entered into an oral agreement with the syndicate to sell the property to them, and on May 24, 1937, executed a declaration of trust in their favour under which it was declared that he held the property in trust for them.

After the outbreak of war in September, 1939, and after the coming into operation of the Courts (Emergency Powers) Act, 1939, under s. 1, sub-s. 2, of which statute it was enacted that before a receiver of mortgaged property was appointed, it was necessary for the leave of the Court to be obtained, the building company obtained the consent of Commander Rich to the appointment of a receiver, and a receiver was appointed without any application to the Court having been made.

At the date of the appointment of the receiver Commander Rich was on the retired list, but had been called up and was engaged in work at the Admiralty.

The consent of the syndicate was not obtained, and this action was commenced by the syndicate and Commander Rich against the mortgagees and the receiver for a declaration that the appointment was void, as the leave of the Court had not been obtained.

*Charles Harman K.C.* and *Herbert Hart* for the plaintiffs. The effect of the statute is to take away from a mortgagee his power to appoint a receiver. No consent can override this. There is a distinction between statutes drawn for the benefit of the private citizen and those drawn for purposes of public policy.

In any event, Commander Rich never did assent. He consented to a receiver being appointed to look after his interests while he was away on service during the war.

[They referred to Maxwell on the Interpretation of Statutes, 8th ed., p. 334: and to *Anchor Trust Co., Ld* v. *Bell* (1); *York Corporation* v. *Henry Leetham & Sons, Ld.* (2); *In re Stapleford Colliery Co.*: *Barrow's* case (3); *Salford Guardians* v. *Dewhurst* (4); *Great Eastern Railway Co.* v. *Goldsmid* (5); *In re Abbey Road Building Society* (*Pomeroy's Trustee*) (6); *Chapman* v. *Michaelson* (7) and *Equitable Life Assurance Society of the United States* v. *Reed.* (8)]

*Roger Turnbull* for the defendants. A statutory provision cannot be waived where the statute itself states that it may not be waived: cf. Increase of Rent and Mortgage Interest (War Restrictions) Act, 1916, s. 1: and the Landlord and Tenant Act, 1927, s. 9. There is nothing in the Courts (Emergency Powers) Act, 1939, indicating that its requirements cannot be dispensed with. Nor is there anything in the present Act showing that this is a question of public policy.

It is a question of personal remedies throughout. The prohibition is the suspension of a power for the benefit of the mortgagor.

[He referred to *In re Sandow, Ld.* (9); and *Salford Guardians* v. *Dewhurst.* (4)

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(1) [1926] Ch. 805, 822.

(2) [1924] 1 Ch. 557.

(3) (1880) 14 Ch. D. 432.

(4) [1926] A. C. 619.

(5) (1884) 9 App. Cas. 927, 936.

(6) Ante, p. 239.

(7) [1908] 2 Ch. 612.

(8) [1914] A. C. 587.

(9) [1916] W. N. 262.

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SOHO SQUARE SYNDICATE, LD. *v.* E. POLLARD & CO.

FARWELL J. This action raises a question of very considerable general importance at the present time; but, as I have formed a clear view, as a result of the arguments which I have heard, I see no reason to defer expressing it.

The question which is of general importance is whether a mortgagee, by obtaining the consent of the mortgagor to the appointment of a receiver, can escape from the provisions of the Courts (Emergency Powers) Act of 1939.

The facts in this case are in a comparatively small compass so far as they are relevant to what I have to consider, and they are these:

[His Lordship stated the facts and said that, on the evidence, he came to the conclusion that the syndicate had not consented to the appointment of the receiver, but that Commander Rich had consented to it. His Lordship then continued:] Counsel for the defendants admits that if the consent of Commander Rich to the appointment of a receiver is not sufficient to entitle the defendants to make the appointment without the leave of the Court the receiver was not properly appointed. If, on the other hand, the consent of Commander Rich was sufficient, then the appointment was properly made and the action fails. The whole matter turns on whether the consent was sufficient or not, and I need not therefore pause to consider any question of estoppel, acquiescence or waiver. In my judgment, those matters do not enter into this question, and I propose to deal with the matter on the basis that the only ground upon which the defendants rely, as showing that this appointment was properly made, is the consent which Commander Rich gave.

I will assume for the moment that Commander Rich did consent to the appointment of a receiver, and on that assumption I will now proceed to consider what is to my mind the really important question in this case, namely, whether that consent was sufficient to take the case out of the Courts (Emergency Powers) Act so as to enable the mortgagee to make the appointment without the leave of the Court.

Now, I turn to the Act. The preamble to the Act is in these terms: "An Act to confer on courts certain powers in "relation to remedies in respect of the non-payment of money "and the non-performance of obligations (including powers "in relation to bankruptcy and winding-up proceedings), and "to make provision for purposes connected with the matters "aforesaid."

The first section provides: "Subject to the provisions of "this section, a person shall not be entitled, except with the "leave of the appropriate court, to proceed to execution on, "or otherwise to the enforcement of, any judgment or order "of any court (whether given or made before or after the "commencement of this Act) for the payment or recovery "of a sum of money." Then there are certain provisos to which I need not refer.

Sect. 2 is the really relevant section: "Subject to the "provisions of this section, a person shall not be entitled, "except with the leave of the appropriate court,—(*a*) to "proceed to exercise any remedy which is available to him "by way of (i.) the levying of distress; (ii.) the taking of "possession of any property or the appointment of a receiver "of any property; (iii.) re-entry upon any land," and then there are certain matters to which I need not refer.

Then sub-s. 4 provides: "If, on any application for such "leave as is required under this section for the exercise of "any of the rights and remedies mentioned in sub-sections (1.), "(2.) and (3.) of this section, the appropriate court is of "opinion that the person liable to satisfy the judgment or "order, or to pay the rent or other debt, or to perform the "obligation in question, is unable immediately to do so by "reason of circumstances directly or indirectly attributable "to any war in which His Majesty may be engaged, the "court may refuse leave for the exercise of that right or "remedy, or give leave therefor subject to such restrictions "and conditions as the court thinks proper."

So far as the appointment of a receiver is concerned as between mortgagor and mortgagee, the effect of this Act, as I read it, is that whereas before this Act came into operation a mortgagee was entitled without any leave of the Court under proper circumstances to appoint a receiver, and assuming the necessary conditions had been complied with there could be no objection to such an appointment; the mortgagee no longer has such power without the leave of the Court. The power of appointing a receiver was a privilege given to a mortgagee for the protection of himself and the property subject to the mortgage which he could exercise at his own volition. This Act steps in and provides in terms that a person shall not be entitled to appoint a receiver without the leave of the Court; with the result that one of the powers which he was entitled to exercise under normal circumstances is taken away from him, and he is no longer in a position to appoint a receiver unless he first obtains the leave of the Court. It is said that, notwithstanding that provision, if the mortgagor chooses to consent to the appointment by the mortgagee of a receiver, then the obligation which rests upon the mortgagee under this Act of first obtaining the leave of the Court has gone, and there is no longer any such obligation; and I suppose it must necessarily follow from the argument on behalf of the defendants that the effect of that consent is to re-create (as it were) a power which existed in the mortgagee before this Act came into operation.

To my mind, it is a little difficult to appreciate how a power, if it is taken away by an Act of Parliament from a person, can be re-created and re-vested in that person merely by the consent of the other party; but it may be that that is not a real difficulty, and I have been referred, and properly referred, to the corresponding Acts which came into being during the last war, the Courts (Emergency Powers) Acts of 1914 to 1916. Under those Acts the way in which matters were dealt with was somewhat different from the way in which matters of this sort are dealt with in this Act, but the language, so far as it relates to this particular question, has a very close resemblance to the language in this Act.

It appears that there were three decisions by three different judges under the old Acts by which it was held that the necessity for obtaining the leave of the Court was something which could be dispensed with by the consent of the person on the other side. The decisions to which I have been referred are, first, a decision of Sargant J. in *In re Sandow.* (1) In that case there does not appear to have been any argument on the matter, but Sargant J. said that the Act of 1916 gave the defendants a personal right which might be waived by them.

That decision was followed by Lawrence J. in *Anchor Trust Co., Ld.* v. *Bell.* (2) In that case Lawrence J. was referred to the decision of Sargant J. in *In re Sandow* (1) and followed it. I am told that there is also a decision of Atkin J. which is unreported; but Mr. Turnbull has been able to obtain some of the papers, and it appears that the learned judge held that the necessity for getting leave to levy a distress could be avoided by the consent of the person in question. So that I am faced with this, that three judges appear to have felt no difficulty in coming to the conclusion that under the earlier Acts the necessity for the mortgagee to obtain the leave of the Court before exercising his powers was a necessity which could be dispensed with by the person concerned, the mortgagor in this case, giving his consent, and although those decisions are not binding on me, because they were decisions under another Act of Parliament, they are decisions which I must have in mind, when construing the Act in this case.

Now, this Act does not contain any section which in terms prohibits what is commonly known as contracting out of the Act, and that is a matter which must be taken very carefully into consideration because there are other Acts which also owe their origin to difficulties arising out of the war, in which such a section is contained. It is said, and said with force, that, had the Legislature intended to prevent contracting out of this Act, there would have been inserted in it a section to forbid it, and there being no such section, the proper inference to be drawn is that it was not intended to prevent parties by agreement from escaping from the obligations imposed by it; and

(1) [1916] W. N. 262.

(2) [1926] Ch. 805.

that, having regard to the way in which very similar enactments in the Acts during the last war were construed by the learned judges, the same principles should be applied in this case.

Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, as a matter of public policy, to have a more extensive operation. The similar Acts in the last war were construed as a prohibition upon the private rights of the mortgagee as against the mortgagor, and in those circumstances there was nothing to prevent a mortgagor and a mortgagee agreeing to contract out of the Act. I think in considering this question I must take into consideration the fact that since the last war, during the years that elapsed down to the beginning of the present war, the position with regard to mortgagors and mortgagees has very largely changed. During that period there has grown up an enormous amount of business with building societies and similar societies for the financing of persons in comparatively humble circumstances who desire to acquire a home through the assistance of building societies. The growth of that sort of business has been very great and there is no doubt whatever that there is a very large number of comparatively small people for whom the Legislature intended to create some protection. It was felt—I think, again, that this is a matter which I am entitled to take into consideration—that men and women who found themselves unable to make the necessary payments at the due time and thereby ran a serious risk of being turned out of their homes should have some protection—people who found that their difficulties were due to the war either directly or indirectly—and that protection was to be afforded to them by imposing upon the mortgagee the necessity of obtaining the consent of the Court before he exercised his power. In the absence of any such legislation one can well imagine that there might be a very far-reaching sense of distress and grievance among a very large number of people, people who might feel that they had been dispossessed of their homes without having any opportunity of putting their side of the matter, and often without very much knowledge of what was being done. It must be remembered that large numbers of persons in that position are persons who have little or no knowledge of law, and, moreover, are persons who have little or no opportunity of obtaining legal advice ; and consequently there is a very much larger class of persons now than there were in the last war, calling for some sort of protection.

If it be right to say that a mortgagee, by merely getting the consent of the mortgagor, can avoid the necessity of applying to the Court, a large part of the protection which this Act was intended to provide would virtually disappear. People in the position of such persons as I have mentioned might easily be persuaded to give a consent without really knowing what exactly was involved in such consent, and an opportunity of expressing their reasons for their inability to pay, whatever they may be, and of stating their difficulties, which is now afforded to them by the necessity of an application to the Court would be entirely removed. Moreover, difficult questions might also arise whether the consent had in fact been obtained, or whether it was a consent which was binding, and similar questions.

It must be borne in mind that in the case with which I am dealing the sums of money are very large, and the parties are parties who had every opportunity of obtaining any legal advice they desired, and that in this particular case it may well be that there would be no particular reason why the consent should not be sufficient ; but I cannot construe this Act merely in relation to the position between these particular parties. As I have said, this question seems to be a very much wider one than that, and I feel very strongly that, underlying this Act of Parliament, is the clear intention of the Legislature to afford some measure of protection to the very large class of persons whom I have mentioned, people who require to be protected, as it were, against themselves. I am, in my view, entitled, and indeed bound, to take those matters into consideration and on those grounds I come to the conclusion that, whatever the effect of the earlier Acts was, the Act in this particular case is an Act which was intended to be more far-reaching than merely an alteration in the rights of individual persons.

I think it is not irrelevant to read a very short passage from the judgment of Pollock M.R. in the case of *Dewhurst* v. *Salford Guardians.* (1) That case went to the House of Lords, and the decision of the Court of Appeal was affirmed in the House of Lords. I only desire to refer to one sentence in the judgment of the Master of the Rolls as putting the sort of considerations which may properly be taken into account in deciding, in a case of this sort, whether contracting out of an Act is permissible or not. In that case the facts were quite different. It was a case of paying pensions to poor law officers, and it was suggested that a poor law officer could enter into a contract with the Guardians in question by which the obligation to pay him or her a pension could be avoided. The Master of the Rolls said this : "I do not think it is possible "to read the Act of 1896 as being intended to confer what "might be called a private and personal benefit upon "individual officers which they can at their will and pleasure "renounce. It seems to me that the intention was to put the "poor law officers in the same position in which police officers, "asylums officers and many other persons have been placed "in the interests of the community at large, and that the "public should be safeguarded from the melancholy spectacle "of seeing a man who had done work and been in a responsible "position during years of his life, suffering from poverty "and distress by reason of the fact that no adequate provision "has been made to enable him to spend his latter years in "reasonable comfort."

If I may paraphrase what the Master of the Rolls said there, it seems to me that the public should be safeguarded in this case from the melancholy spectacle of seeing a man, owing to the difficulties which have arisen by the reason of the war or by his serving his country, deprived of his home possibly, or, at any rate, seriously prejudiced without any protection from the Court ; and to prevent the natural feeling of unrest and

(1) [1925] Ch. 655, 664.

grievance which might well arise as a result of a feeling of injustice and hardship, I am entitled, as it seems to me, to take those matters into consideration equally as much as the Master of the Rolls took them into consideration in coming to the conclusion in the case to which I have referred, that the Act was one out of which the parties could not contract, and it seems to me that similar reasons ought to move me in considering the same kind of question in relation to this particular Act.

In my judgment, for the reasons which I have endeavoured to express, this Act is an Act not merely passed for the purpose of dealing with the individual rights of private persons; it has a more far-reaching scope than that, and it was intended as a matter of public policy to deprive the mortgagee of the powers which he otherwise could have exercised, and to impose upon him as a condition of the exercise of those powers that he should first obtain the leave of the Court. If that be the true view of this Act, then it is immaterial to consider whether there was a consent, or whether it was a proper consent, because if the leave of the Court is necessary, whether there be consent or not, and it being admitted that there was no such leave obtained, it must necessarily follow that the appointment was an invalid appointment. As I have said, this is a question of great general importance, and it may well be that this case will go elsewhere, and in those circumstances I think I ought to express in a very few words the conclusions to which I have come on the questions of fact in this particular case.

So far as the plaintiff, Commander Rich, is concerned, I am satisfied on the evidence that he did consent, but I am also satisfied that he consented without a sufficient knowledge of all the circumstances. No consent can be sufficient unless the person who is consenting has a sufficient knowledge of all the facts and all the matters which ought to be taken into consideration; and among the matters to be so considered by a mortgagor are the terms of the Courts (Emergency Powers) Act. That certainly was never a matter which came to the attention of Commander Rich at all. I am satisfied on the evidence that it never occurred to him, that he was consenting to give up his right to require the mortgagee to obtain the leave of the Court, although he did consent, and was consenting, to the appointment of a receiver. So that even had his consent been sufficient to avoid the Act, in my judgment the consent in this particular case given by Commander Rich would not have been sufficient under the circumstances.

Apart from that, there is a further difficulty in the way of the defendants, even assuming that consent was sufficient, and that is this: Commander Rich was merely a bare trustee of this property for the syndicate. That was a fact that the defendants knew through their solicitors, and in those circumstances to obtain the consent of a bare trustee, without any reference to the beneficial owners, seems to me to be itself wholly insufficient to enable the mortgagees to escape from the provisions of this Act. I am satisfied that had an application been made for leave, and had the facts been brought to the notice of the Court, the Court would have required the beneficial owners, the syndicate, to be represented. That the syndicate never consented but always objected to the appointment is on the evidence clear beyond all question. So that, in my judgment, even if I am wrong in thinking that this is a case where there can be no contracting out of the Act, the facts in this case do not go far enough to show that there ever was any such consent as would enable this appointment to be held a valid appointment.

Finally, I desire to say this. Nothing that I have said in this judgment can in any way affect the right of the defendants to make the necessary application under the Act, if they see fit to do so, for leave to appoint a receiver; nor is there anything in what I have said which is intended to prejudice or influence in any way that application. The application, if the defendants see fit to make it, is one which they are entitled to make, and it will be decided by the Court without regard to this decision. In other words any application to the Court for leave will be in no way prejudiced or affected by the result of this decision.

In the result, the plaintiffs are entitled to the declaration for which they ask. The evidence is that the receiver has never in fact received anything, and it will therefore be unnecessary to direct the account which is asked for to be taken. The defendants must pay the costs of the action.

Solicitors: *Arthur Pyke & Co.*; *Sydney Redfern & Co.*

J. L. D.

BENNETT J.

1940

May 7.

## KAY *v.* LOVELL.

[1938. K. 828.]

*Solicitors—Costs—Partnership action—Funds in Court—Charging order —Form of order—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69.

Under s. 69 of the Solicitors Act, 1932, any Court in which a solicitor has been employed to prosecute or defend a suit, matter or proceeding may declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding.

On an application by the solicitor of the plaintiff in a partnership action for a charging order for costs on a fund in Court standing to the credit of the action, the Court will make an order in the terms of Form 6 in Seton's Judgments and Orders, 7th ed., vol. ii., p. 1044. That form is and has for many years been the form of order in a partnership action, and does not in any way limit or restrict the costs to which the solicitor is entitled under the Act to his costs in respect of the property "recovered "or preserved" in the action.

PROCEDURE SUMMONS.

This was an application, by procedure summons in a partnership action by Mr. Alfred Ernest Glover, Mr. Gerald Alfred Glover and Mr. Bernard James Apthorpe-Webb, practising in partnership as solicitors (hereinafter called "the applicants"), for a solicitor's charging order under s. 69 of the Solicitors Act, 1932. (1) On October 10, 1938, the writ in the action was issued, and on October 18, 1938, a receiver was appointed on a motion. On March 16, 1939, the Master made an order of the same kind as was sought on this summons, for the applicants' costs down to date out of a fund in Court which, at the date of this summons was 9964*l.* 18*s.* 4*d.* On April 18, 1939, another receiver was appointed to act jointly with the original receiver.

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(1) Sect. 69: "Any court in "which a solicitor has been em-"ployed to prosecute or defend "any suit, matter or proceeding, "may at any time declare the "solicitor entitled to a charge on "the property recovered or pre-"served through his instrument-"ality for his taxed costs in "reference to that suit, matter or "proceeding, and may make such "orders for the taxation of the "said costs and for raising money "to pay, or for paying, the said "costs out of the said property as "they think fit, . . . ."

On November 16, 1939, the Master made a further charging order for costs down to that date: and, following those two orders, this summons was issued on March 27, 1940, asking for a similar order. Morton J., on March 12, 1940, had given a decision on the point in *In re Clayton* (1) and the Master doubted whether he could make an order.

Accordingly, the summons asked (1.) that it might be declared that the applicants, as the solicitors engaged by the plaintiff in the prosecution of the action, were entitled to a charge on the sum of 9964*l.* 18*s.* 4*d.* cash in Court to the credit of the action, for their taxed costs, charges and expenses as between solicitor and client of or in reference to the action properly incurred as such solicitors since November 16, 1939; (2.) that it might be referred to the Taxing Master to tax those costs as between solicitor and client from the foot of the taxation directed by the order of November 16, 1939, including therein their costs of and incident to this application; (3.) that, out of the said sum of 9964*l.* 18*s.* 4*d.*, the said costs, charges and expenses be paid to the applicants.

The application was opposed by Brooks, Phillips and Company, Ld. (hereinafter called "the respondents"), creditors of the partnership.

*E. M. Winterbotham* for the applicants. A form of order is given in Seton's Judgments and Orders, 7th ed., vol. ii., p. 1044. It is Form 6, and is headed "Lien for costs declared "on funds in Court in partnership action. Stop order." The form is as follows: "Order that C.D. be appointed to represent "all creditors of the said firm for the purpose of this application; Declare that the applicant, as the solicitor lately "employed by the plaintiff in the prosecution of this action, "is entitled to a charge upon the shares and interest of the "plaintiff and the defendant, and the said creditors, and of "each of them respectively, of and in £—— in Court to the "credit of, &c., and of and in the balance in the hands of the "receiver, for the taxed costs, charges and expenses of the "applicant properly incurred of and in reference to this action

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(1) Ante, p. 539.

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"as solicitor of the plaintiff, including the costs of this application. Reference to tax the said costs, with liberty to apply "for payment. Stop order on funds in Court in favour of the "applicant."

*In re Clayton* (1) does not decide that in every case the Court's order ought to be limited to the costs properly incurred by the solicitor in recovering and preserving the property. Morton J. there held that the Court's statutory power extends more widely than is stated in the note, beginning with the words "Charging order for costs on property 'recovered or "'preserved,'" on p. 2371 of the Annual Practice, 1940, and that it extends to the whole of the solicitor's costs in reference to the whole of the action. The learned judge went on to decide that, as a matter of principle, the Court's order ought to be limited to the costs properly incurred by the solicitor in recovering and preserving the property, the Court proceeding on the principle that the solicitor is to be rewarded to the extent of receiving those costs: and he held that, in the case before him, there was no reason to depart from that principle and give the solicitors a wider charge.

It is to be remembered, moreover, that in *In re Clayton* (1) Morton J. had before him an application in an administration action. The application here is in a partnership action. The form in Seton's Judgments and Orders is specifically directed to partnership actions, and follows the statute. The applicants therefore ask the Court to make an order in that form. [He referred to *Jackson* v. *Smith*. (2)]

*Meyrick Beebee* for the respondents. In *In re Clayton* (1) Morton J., basing himself on the Court of Appeal's decision in *Greer* v. *Young* (3) takes the view that the principle of salvage is fundamental to this type of case: that is to say, the solicitor is paid only for what he does. Morton J. quoted from that case Chitty J.'s observation, which counsel had cited in argument: "A point to which I called counsel's attention was that the "order had not been so drawn as to limit, as it ought to have "done, the costs of the solicitor to his costs properly incurred

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(1) Ante, p. 539.

(2) (1884) 53 L. J. (Ch.) 972.

(3) (1883) 24 Ch. D. 545, 549.

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"in recovering and preserving the property." Morton J. has quite definitely said that, unless there are special circumstances, the form of order which he has made is the one that should be followed. [He referred to *Emden* v. *Carte.* (1)]

BENNETT J. I shall make an order in the terms of Form 6 in Seton's Judgments and Orders, 7th ed., vol. ii., p. 1044, which is the form of order in a partnership action. It is an order which, so far as I know, has been made in partnership actions for years, and does not in any way restrict or limit the costs to which the solicitor is entitled under the act to his costs in respect of the property "recovered or preserved" in the action. In an administration action it may be appropriate to make a different form of order because of either of the parties dealing with matters in no way connected with the salvage or preservation of property. That, however, does not seem to me to be so in the case of a partnership action.

Accordingly I make an order in the form asked for by the summons.

Solicitors: *Glover, Scott & Apthorpe-Webb; C. R. Enever & Co.*

K. R. A. H.

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(1) (1881) 19 Ch. D. 311.

BENNETT J.
1940
May 7, 10.

# *In re* THE CORPORATE EQUITABLE PROPERTY SOCIETY, LIMITED.

## GARDAM *v.* THE SOCIETY AND OTHERS.

[1939. C. 3273.]

*Emergency legislation—Company—Debenture stock—Trust deed—Debenture stockholder's action—Motion for judgment that trusts of deed " be performed and carried into execution with usual " consequential accounts and inquiries "—Proceedings for foreclosure " or for sale in lieu of foreclosure "—Leave required for motion—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2, *para.* (*b*).

By s. 1, sub-s. 2, para. (*b*), of the Courts (Emergency Powers) Act, 1939: " Subject to the provisions of this section, a person " shall not be entitled, except with the leave of the appropriate " court, . . . . (*b*) to institute any proceedings for foreclosure or " for sale in lieu of foreclosure, . . . . "

A debenture holder's action is within the description " proceedings for foreclosure or for sale in lieu of foreclosure." Therefore, since there are circumstances in which debenture holders can obtain foreclosure orders, leave to move for judgment in the action must be obtained under the Act.

*Sadler* v. *Worley* [1894] 2 Ch. 170 considered.

MOTION FOR JUDGMENT.

This was a motion for judgment in default of defence in a debenture holder's action. The applicant on the motion was Peter Gardam (hereinafter called " the applicant "), who, on behalf of himself and all the other debenture stockholders entitled to the benefit of a debenture stockholders' trust deed dated October 14, 1937, and made between the Corporate Equitable Property Society, Ld. (hereinafter called " the "society "), of the one part, and Robert Richards and Ernest James Aquila Clapshaw (hereinafter together called " the "trustees ") of the other part, asked that the trusts of the trust deed be performed and carried into execution, with the usual consequential accounts and inquiries.

The society was registered under the Industrial and Provident Societies Acts, 1893 to 1928, and the deed contained a charge on its property. The object of the action was to obtain realization of the property and its distribution among the debenture stockholders.

The writ in the action was issued on October 13, 1939, after the Courts (Emergency Powers) Act, 1939, had come into operation. The action came before the Court on a motion to appoint a receiver. By an oversight the Court failed to notice s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, and made an order appointing a receiver. The statement of claim was delivered, and the action now came before the Court on a motion for judgment, in default of defences, for an order that the trusts of the deed be performed and carried into execution, with the usual consequential accounts and inquiries.

*Maurice Berkeley* for the applicant. In *Gasson and Hallagan, Ld.* v. *Jell* (1) it was decided that a mortgagee could not circumvent the act by starting proceedings under a covenant.

Form 563 in Palmer's Company Precedents, 15th ed., Part III., p. 832, is a debenture holder's foreclosure order. A note entitled "Debenture Holders" on p. 1144 of the Annual Practice, 1940, states that: "An order for foreclosure "may be made on an originating summons at the instance "of debenture holders . . . ." and *Sadler* v. *Worley* (2) is cited. There Kekewich J. decided that a debenture confers on the holder, if it becomes immediately payable through a winding up, the ordinary mortgagee's remedy by foreclosure. It is submitted, however, that that does not make debenture holders' actions "proceedings for foreclosure or for sale in "lieu of foreclosure" within s. 1, sub-s. 2, para. (*b*), of the Courts (Emergency Powers) Act, 1939. The explanation of the position is that there is a gap in the Act here. I understand that there is an amending Act in contemplation at the moment.

[BENNETT J. In my view these proceedings are "for "foreclosure or for sale in lieu of foreclosure." The beneficiaries are, in effect, seeking to enforce their charge. The real purpose is to make the security available for payment of the lenders' debt. What you are asking for is a sale. Every debenture holder's action now is one in which leave must be obtained before proceedings can be taken. I consider it very unfortunate. I refuse the motion, as I must do.]

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(1) Ante, p. 248.

(2) [1894] 2 Ch. 170.

This action is not "for foreclosure or for sale in lieu of "foreclosure." It is impossible for a debenture stockholder to obtain foreclosure where, as here, there is a trust deed: *Schweitzer* v. *Mayhew.* (1)

BENNETT J. [after stating the facts as set out above:] On this motion the provisions of the Courts (Emergency Powers) Act, 1939, have been present to my mind. No leave has been obtained, and it has been suggested, in support of the motion, by Mr. Berkeley (who is not responsible for the statement of claim) that these proceedings are not "proceed-"ings for foreclosure or for sale in lieu of foreclosure" within s. 1, sub-s. 2, para. (*b*).

It is the common practice, now, to regard debenture holders' actions as "proceedings for foreclosure or for sale in lieu of "foreclosure," and to require, before such a motion as this is commenced, that leave shall be obtained under the Courts (Emergency Powers) Act, 1939. The reason for that is that there are circumstances under which debenture holders can obtain orders for foreclosure.

In my judgment, in view of Kekewich J.'s decision in *Sadler* v. *Worley* (2), there is no reason why, in a properly constituted suit, the debenture stockholders and their trustees should not be able to obtain, as against the society, a decree for foreclosure. That being so, these proceedings must be regarded as "proceedings for foreclosure or for sale in lieu "of foreclosure" within the meaning of s. 1, sub-s. 2, para. (*b*), of the Act, for which leave is required. Consequently I am unable to make an order.

Solicitors: *Warren & Warren.*

(1) (1862) 31 Beav. 37.

(2) [1894] 2 Ch. 170.

K. R. A. H.

## KERR *v.* JOHN MOTTRAM, LIMITED.

SIMONDS J.

1940 May 7.

[1939. K. 474.]

*Company—Articles of association—Minutes of meeting—Bona fide record—Whether conclusive evidence of facts stated.*

A shareholder in a company, the articles of association of which provided that the minutes of any meeting if purporting to be signed by the chairman should be " conclusive evidence without "any further proof of the facts therein stated," brought an action against the company for specific performance of an alleged contract and proposed to call evidence inconsistent with the signed minutes of an extraordinary general meeting :—

*Held,* that the words " conclusive evidence " meant evidence which was not to be displaced and was conclusive as between the parties bound by the minutes and that, accordingly, the evidence tendered by the plaintiff was inadmissible.

WITNESS ACTION.

On June 13, 1939, the plaintiff, Ewen Mackinnon Kerr, began an action against the defendant company, John Mottram, Ld., in which he was a shareholder, for specific performance of an alleged contract entered into on February 7, 1939, for the sale to him by it of certain shares in its capital. It refused to recognise him as the purchaser of the shares, and pleaded (inter alia) that no contract for the sale of the shares was entered into.

The plaintiff's case was that in January, 1939, the defendant company had sent its members a notice convening an extraordinary general meeting to be held on February 7, 1939, intimating that a member of the company was indebted to it in the sum of nearly 3500*l.*, and stating that at the meeting 4639 preference shares and 5050 ordinary shares standing in his name would be offered to the assembled members at the best price obtainable. He said that at the meeting the sale was conducted as an auction, that the sale was without reserve, and that he was the highest bidder.

To establish the case for the plaintiff, it was proposed to call evidence inconsistent with the minutes of the meeting on February 7, 1939, recording certain resolutions passed thereat.

At an extraordinary general meeting of the defendant company held on July 5, 1939, a resolution had been carried, whereby the minutes were confirmed and the chairman authorized to sign them as correct. This he accordingly did.

Objection having been taken to the evidence proposed to be called, the secretary of the defendant company, one Thomas Jones, proved the minute book, the minutes of the meeting in question and the signature of the chairman.

By art. 11 of the articles of association of the defendant company, it was provided that the company should have a first and paramount lien on all shares registered in the name of any member for his debts and liabilities and engagements to or with the company. By art. 12, it was provided that the company might sell the shares subject to any such lien at such time and in such manner as it thought fit.

By art. 114: "The directors shall cause proper minutes "to be made of all general meetings of the company and also "of all appointments of officers and of the proceedings of all "meetings of directors and committees and of the attendance "thereat, and all business transacted at such meetings, and "any such minute of any meeting, if purporting to be signed "by the chairman of the next succeeding meeting, shall be "conclusive evidence without any further proof of the facts "therein stated."

*Alexander Grant K.C.* and *R. J. T. Gibson* for the plaintiff. Evidence inconsistent with the minutes is admissible. The secretary may be wrong in his record of what occurred. Though under art. 114 the minutes are binding on him, they are not binding on the members of the company generally.

*Norman Daynes K.C.* and *D. H. Cohen* for the defendant company. Under art. 114 the minutes are binding on the members of the company. The words "conclusive evidence" mean evidence which cannot be rebutted and is conclusive as between the parties bound by the minutes: *In re Hadleigh Castle Gold Mines, Ld.* (1); *Arnot* v. *United African Lands, Ld.* (2) This evidence is inadmissible.

(1) [1900] 2 Ch. 419.

(2) [1901] 1 Ch. 518.

SIMONDS J. This action raises a curious point upon which, I am told, there is no previous decision. The plaintiff, Ewen Mackinnon Kerr, a shareholder in John Mottram, Ld., sues that company claiming specific performance of a contract for the sale to him by it of certain of its preference shares and ordinary shares, which it was in a position to sell by virtue of a lien given to it by arts. 11 and 12 of the articles of association. For the purpose of establishing that contract he must lead evidence to show that it was in fact entered into without any qualification. Upon counsel for the plaintiff seeking to lead such evidence, objection was taken by counsel for the defendant company that he was not entitled to do so, inasmuch as that evidence was inconsistent with what was recorded in the minutes of a meeting of the company held on February 7, 1939, and for that purpose he relied upon art. 114 of the articles of association, which provides as follows: [His Lordship read the article, and continued :] In order to support the objection to the evidence proposed to be led by the plaintiff, the defendant company had to prove the minute book and to prove that the signature to the minutes of the meeting of February 7, 1939, was that of the chairman of the meeting at which they were confirmed. Accordingly, Mr. Jones, the secretary of the company, who was also a director, was called to prove that this was the minute book of the company, that the minutes relied on were those of the meeting in question, and that the signature was that of the chairman. That gave counsel for the plaintiff the opportunity of establishing, if he could, that the minutes were not a bona fide record of what took place and that they had been written up after the events, falsely and fraudulently, with a view to setting up a story which was not in accordance with the facts. I am quite satisfied, after hearing the evidence of Mr. Jones, that the minutes are substantially correct and are a bona fide record of what took place on February 7, 1939. I am not saying that they are in every respect accurate ; that I do not know, but of this I am satisfied, that they are not fraudulently written up. Accordingly I have to examine whether, without this element of fraud, the objection taken by counsel for the defendants to the leading of the suggested evidence is sustainable.

Now, art. 114 which I have read represents the bargain between the shareholders as to what is to be, as between them, the value and effect of the minutes of the company as recorded in its minute book and signed by the chairman, and their bargain is that it is to "be conclusive evidence without any "further proof of the facts therein stated." I have no doubt that the words "conclusive evidence" mean what they say; that they are to be a bar to any evidence being tendered to show that the statements in the minutes are not correct. The words "conclusive evidence" which appear in this article appear also in the Companies Act, 1929, s. 117, sub-s. 3, which provides that: "At any meeting at which an extraordinary "resolution or a special resolution is submitted to be passed, a "declaration of the chairman that the resolution is carried shall, "unless a poll is demanded, be conclusive evidence of the fact "without proof of the number or proportion of the votes "recorded in favour of or against the resolution." Now, those last words, which appear in s. 51 of the Companies Act, 1862, the predecessor of s. 117 of the Act of 1929, were interpreted by the Court, first in the case of *In re Hadleigh Castle Gold Mines, Ld.* (1), and again by the Court of Appeal in *Arnot* v. *United African Lands, Ld.* (2), and from those decisions it is clear that the words, as they are used, are to bear their natural meaning. That is to say, the minutes are to be regarded as evidence which is not to be displaced and is conclusive as between the parties who are bound by them.

If that is so, that is an end of the plaintiff's case, because it is clear upon a reading of the minutes that no such contract was entered into on February 7, 1939, as that which he seeks to establish.

The result must be that this action will be dismissed with the usual consequences.

Solicitors: *Lovell, White & King, for Pickering & Pickering, Stafford; Gibson & Weldon, for Hand, Morgan & Co., Stafford.*

F. C.

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(1) [1900] 2 Ch. 419.

(2) [1901] 1 Ch. 518.

## *In re* DEMAREST'S SETTLEMENT TRUSTS.

## CHASE NATIONAL EXECUTORS AND TRUSTEES CORPORATION, LIMITED *v.* ATTORNEY-GENERAL.

BENNETT J.

1940

April 5, 9.

[1940. D. 153.]

*Revenue—Estate duty—Exemption—War Loan Stock—English settlement—Settlor domiciled in United States of America—Beneficiary resident in United Kingdom—No exemption from estate duty on settlor's death—Finance* (*No.* 2) *Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 47.

By s. 47 of the Finance (No. 2) Act, 1915: "The Treasury "may, if they think fit, during the continuance of the present "war and a period of twelve months thereafter, issue any securities "which they have power to issue for the purpose of raising any "money or any loan with a condition that neither the capital nor "the interest thereof shall be liable to any taxation, present or "future, so long as it is shown in manner directed by the Treasury "that the securities are in the beneficial ownership of persons who "are neither domiciled nor ordinarily resident in the United "Kingdom, and securities issued with such a condition shall be "exempt accordingly.

Under the section the Treasury issued the 3½ per cent. War Loan. The prospectus on which it was offered stated, in effect, that stocks and bonds of the loans and dividends payable in respect of them would be exempt from British taxation if it were shown in manner directed by the Treasury that they were beneficially owned by a person neither domiciled nor ordinarily resident in the United Kingdom of Great Britain and Ireland, and that the dividends would be exempt from British income tax if it were likewise shown that the stocks or bonds were beneficially owned by a person not ordinarily there resident, without regard to the question of domicil.

The settlor was domiciled and ordinarily resident in the United States of America, and the trustee of the settlement was an English company with a registered office in London. The settlement was for the benefit of the settlor's grandson, who was resident in the United Kingdom. Less than three years after the date of the settlement the settlor died domiciled in the United States of America:—

*Held*, that, under s. 2, sub-s. 1, para. (*c*), of the Finance Act, 1894, estate duty was payable on his death in respect of the settled fund, as the trustee company held it in trust for a beneficiary ordinarily resident in the United Kingdom and, on the facts, were not within the class of persons exempted by s. 47 of the Finance (No. 2) Act, 1915, from liability to estate duty.

ADJOURNED SUMMONS.

This summons raised the question whether a sum of 3½ per cent. War Loan Stock comprised in an English settlement made by a settlor domiciled in the United States of America for the benefit of a person resident in the United Kingdom attracted estate duty on the settlor's death.

By a settlement dated February 11, 1935, and made between Henry Samuel Demarest (hereinafter called "the settlor"), who was domiciled and ordinarily resident in the United States of America, and the Chase National Executors and Trustees Corporation, Ld. (hereinafter called "the plaintiffs"), whose registered office was at Moorgate, London, E.C., British 3½ per cent. War Loan Stock of the face value of 5000*l.* was settled for the benefit of the settlor's grandson, Donald de Gray Demarest Junior, who was resident in the United Kingdom.

The settlor died less than three years later, namely, on July 11, 1937, domiciled in the United States of America; and by this summons, taken out on January 25, 1940, the plaintiffs asked (inter alia) whether estate duty was payable under s. 2, sub-s. 1, para. (*c*), of the Finance Act, 1894, on his death in respect of the settled fund.

*J. S. Scrimgeour* for the plaintiffs. The War Loan was offered for subscription upon a prospectus containing a statement which was quoted by Lord Wright M.R. in his judgment in *Hughes* v. *Bank of New Zealand.* (1) That case turned on the effect of s. 47 of the Finance (No. 2) Act, 1915, with regard to income tax: see the observations of Lord Wright M.R. In the present case the short point is that the capital of the stock comprised in the settlement is not liable to estate duty: for, had the settlor kept it for himself so that it in fact passed on his death, it would have been exempt; and, on the true construction of s. 2, sub-s. 1, para. (*c*), of the Finance Act, 1894, and of s. 38 of the Customs and Inland Revenue Act, 1881, which it incorporates, property which is deemed to pass on death because it has been given away within three years of

(1) [1937] 1 K. B. 419, 429, 430.

the death, and would therefore have had to be included in an account under s. 38 of the Act of 1881, carries with it the same consequences with regard to estate duty as if it had not been parted with, but had in fact formed part of the estate.

There appears to be no authority directly on this point, and there are expressions of opinion in Green on Death Duties, Dymond on Death Duties, and Hanson on Death Duties, inconsistent with this view, but, when the scope of s. 38 of the Act of 1881 is examined in the light of the observations made on it in the Court of Appeal, it is the same as the scope of the probate duty which it was passed to enforce. Probate duty, which was brought into being in 1694, was avoided by people giving away their property shortly before they died. In 1881, account duty was imposed in order to prevent such property from escaping liability. The nature of the two duties is the same.

In considering the meaning of a condition such as that subject to which the War Loan was issued, it is necessary to bear in mind the object of the provision, which was, to make the investment attractive to foreigners by assuring them that it would not attract British taxation in their hands. [He referred to *In re* Payne (1), and to the judgments of Clauson and Luxmoore L.JJ.] Those passages go to show that the whole basis of the liability for duty is that property which has been given away is to be deemed to have been restored to the deceased's estate, and all consequences with regard to estate duty are to follow which would have followed had it been part of that estate, including exemption in the case of War Loan.

With regard to 3 per cent. War Loan, 1955–1959, see Finance (No. 2) Act, 1931, s. 22, sub-s. 1. (2) The duty is claimed

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(1) Ante, p. 576.

(2) Sect. 2, sub-s. 1: "Any "securities issued by the Treasury "under any Act may be issued "with the condition that—(*a*) so "long as the securities are in the "beneficial ownership of persons "who are not ordinarily resident "in the United Kingdom, the "interest thereon shall be exempt "from income tax; and (*b*) so "long as the securities are in the "beneficial ownership of persons "who are neither domiciled nor "ordinarily resident in the "United Kingdom, neither the "capital thereof nor the interest "thereon shall be liable to any "taxation present or future."

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under s. 2, sub-s. 1, para. (*c*), of the Act of 1894, incorporating s. 38 of the Customs and Inland Revenue Act, 1881. The object of that section was to prevent the avoiding of probate duty by treating gifts inter vivos made within the period as if they were part of the deceased's estate. That hypothesis is the ground of the liability for duty, and the same hypothesis should be carried into the construction of s. 47 of the Finance (No. 2) Act, 1915. The account duty enacted in 1881 applied only to persons domiciled in this country. It did not apply to foreigners. [He referred to *Attorney-General* v. *de Préville* (1), and to the judgments of A. L. Smith and Vaughan Williams L.JJ.] The passages in these judgments show that the object of the account duty is to put the property back into the deceased's estate so far as liability to death duties is concerned.

The text book writers do not support this view. See, in particular, Dymond on Death Duties, 8th ed., pp. 197–198, where it is stated that in the case of a gift inter vivos it would seem that it is the domicil and residence of the donee at the date of death of the donor which determine whether the exemption applies, the stock being then in the donee's beneficial ownership. That passage ignores the basis of the account duty, which was designed to charge the gift as if it formed part of the donor's estate. See also Hanson on Death Duties, 8th ed., p. 261, footnote, where the opinion is expressed that "beneficial ownership" means beneficial ownership in possession. But the basis of liability to estate duty under s. 1 is that the property has passed from the owner in possession and liability under s. 2, sub-s. 1, para. (*c*), and s. 38 of the Act of 1881 is based on a hypothetical passing on death and there is no real reason for any difference in the application of the exemption as between the two cases. See also Greene on Death Duties, p. 496, para. 10. None of the books except Dymond deals precisely with the point, and Dymond takes a wrong view of the intention and effect of the condition. The Court is asked to decide that in this case no duty is payable.

*J. H. Stamp* for the Attorney-General. This is a simple

(1) [1900] 1 Q. B. 223, 227, 231.

question of construction of a quite plain section of the Finance (No. 2) Act, 1915. The moment that it is found that property, at the time when duty attaches to it, is in the beneficial ownership of a person domiciled or resident in the United Kingdom, the exemption cannot be claimed. [He referred to s. 6, sub-s. 4, of the Finance Act, 1894, empowering the Commissioners to allow the amount of duty on foreign property, and to s. 8, sub-s. 4, of the Act, making every person to whom property passes beneficially, and also every trustee, guardian, committee, or other person in whom any interest in the property, or the management of it, is at any time vested, accountable for estate duty where the executor is not accountable for it.] Property coming within s. 38 of the Customs and Inland Revenue Act, 1881, is almost ex hypothesi excluded from the exemptions, because, to come within s. 38 at all, it must have ceased to belong to the donor before the time at which tax attaches to it.

It would take an impossible constructional modification of s. 47 of the Finance (No. 2) Act, 1915, to bring this case within it.

*J. S. Scrimgeour* in reply.

BENNETT J. [after stating the facts:] In my judgment estate duty is payable for the reason that the plaintiffs have failed to show that the securities in question are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom. It is upon the plaintiffs to show that they are the persons entitled to the benefits of the provisions of s. 47 of the Finance (No. 2) Act, 1915. The plaintiffs themselves are an English limited company, with a registered office in Moorgate in the City of London. They hold the property in trust for a beneficiary who is ordinarily resident in the United Kingdom. On those facts it is not possible, in my judgment, for the plaintiffs to maintain the proposition that they are within the class of persons exempted from liability to estate duty by the provisions of s. 47 of the Finance (No. 2) Act, 1915. The answer, therefore, in my judgment, to the first question, should be in the affirmative. It is admitted that the answer to the second question asked

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DEMAREST'S SETTLEMENT TRUSTS, *In re.*
CHASE NATIONAL EXECUTORS AND TRUSTEES CORPORATION, LD. *v.* ATTORNEY-GENERAL.

"Whether such duty is payable in respect of the value of the "settled fund comprised in the settlement at the date of the "death of the said Henry Samuel Demarest deceased or in respect "of such value at the date of the said settlement" should be that duty is payable on the value at the date of the death of the said Henry Samuel Demarest; so that question must be answered in that sense.

Solicitors: *Linklaters & Paines; Solicitor of Inland Revenue.*

K. R. A. H.

## BISMAG, LIMITED *v.* AMBLINS (CHEMISTS), LIMITED.

C. A.

1940

March 7, 8;
April 15, 16;
May 9.

[1939. B. 403.]

*Trade mark—Infringement—Proprietary medicine—Published formula—Advertisement of competing article—Mark referred to in pamphlet for price comparison—Not used in reference to proprietor of mark or to goods so marked—No infringement—Trade Marks Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 4.

By the Trade Marks Act, 1938, s. 4, sub-s. 1: "The "registration . . . . of a person in Part A of the register as "proprietor of a trade mark . . . . in respect of any goods, shall "if valid give . . . . that person the exclusive right to the use of "the trade mark in relation to those goods, and . . . . that "right shall be deemed to be infringed by any person who, not "being the proprietor of the trade mark or a registered user "thereof using by way of the permitted use, uses a mark identical "with it or so nearly resembling it as to be likely to deceive or cause "confusion, in the course of trade, in relation to any goods in "respect of which it is registered, and in such manner as to render "the use of the mark likely to be taken either (*a*) as being use as "a trade mark; or (*b*) in a case in which the use is use upon "the goods or in physical relation thereto or in an advertising "circular or other advertisement issued to the public, as "importing a reference to some person having the right either "as proprietor or as registered user to use the trade mark or "to goods with which such a person as aforesaid is connected "in the course of trade."

The plaintiffs were the owners of a trade mark in the word "bisurated" as applied to "bisurated magnesia," a proprietary medicine sold under a published formula. The defendants, who were manufacturing chemists and retailers, sold the plaintiffs' goods and also made and sold a similar preparation which they called "bismuthated magnesia." They published a pamphlet containing a list of various proprietary medicines made to formula, including bisurated magnesia, and opposite to this list a number of medicines made by them, said to be similar in all respects to the proprietary medicines, but sold, as stated, at a much lower price, the formulæ published in both lists being identical. The plaintiffs having claimed an injunction to restrain the defendants from infringing their mark:—

*Held* (per Sir Wilfrid Greene M.R. and Clauson L.J., MacKinnon L.J. dissenting) that the defendants had used the plaintiffs' trade mark as a convenient method of describing the merits of their own goods and had infringed the exclusive right of the plaintiffs as defined by s. 4, sub-s. 1, of the Act.

*Irving's Yeast-Vite, Ld.* v. *Horsenail* (1934) 103 L. J. (Ch.) 106 held to be overruled by s. 4, sub-s. 1, of the Act.

Decision of Simonds J. ante, p. 225 reversed.

C. A.

1940

BISMAG, LD.
v.
AMBLINS
(CHEMISTS),
LD.

APPEAL from a decision of Simonds J. (1)

The plaintiffs, Bismag, Ld., were manufacturing chemists, and made and sold through retailers a widely advertised proprietary medicine consisting of a compound of bismuth and magnesia with other ingredients. They were the owners of the registered trade mark " bisurated " for this compound, which was sold as " bisurated magnesia," in tablets and powder.

The defendants, Amblins (Chemists), Ld., were also manufacturing chemists, but sold their goods in their own retail shops, in which they also offered for sale various proprietary medicines, including the plaintiffs'. They issued an advertising pamphlet in which they claimed that most patent medicines were sold at too high a price. In this, in parallel columns, they gave a list of well known proprietary medicines with the formula to which each was made and the price, and opposite to these a list of medicines prepared by them, made in all cases to similar formulæ, and sold at lower prices. In the case of the plaintiffs' preparation the left-hand column read: " Bisurated magnesia tablets. Analysis: Bismuth "Carb. Soda Carb. Magnesia Carb. Excipient. Price, "1s. 3*d*. for about 50 tablets." The right-hand column, opposite to this, describing the defendants' preparation read: "Prescription No. 7. Bismuthated magnesia. Analysis: "Bismuth Carb. Soda Carb. Magnesia Carb. Excipient. "Price, 30 tablets, 6*d*., 75 tablets, 1*s*." The plaintiffs also sold bisurated magnesia in powder form, and the defendants offered for sale a competing preparation. The defendants also sold the plaintiffs' among other proprietary medicines, but made the fact that their own medicines were cheaper, prominent.

The plaintiffs brought an action to restrain the defendants from publishing this pamphlet on the ground that it was an infringement of their trade mark.

Simonds J. held that the pamphlet, having mentioned the trade mark " bisurated " only as applying to the plaintiffs' goods, and not to the defendants', was not an infringement of the trade mark within the Trade Marks Act, 1938, s. 4.

The plaintiffs appealed.

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(1) Ante, p. 225.

*W. Trevor Watson K.C.*, *R. E. Burrell K.C.* and *J. Mould* (for *R. A. B. Shaw*, on war service) for the appellants. The respondents' use of the trade mark was an infringement under s. 4 of the Act, though not directed to indicate the origin of their goods. This section has given the appellants a new legal right. The Legislature intended to change the law and the effect has been to annul the ruling of the House of Lords in *Irving's Yeast-Vite, Ld.* v. *Horsenail.* (1) The object was to protect goodwill which had been built up against persons indirectly using a trade mark not their own. The circular in this case imported a reference to the proprietors of this trade mark or their goods. In that way the respondents took for the goods which they were selling the benefit of the goodwill associated with the use of the mark. The rights given by s. 4, sub-s. 1 (*b*), are wider than those conferred by sub-s. 1 (*a*). The omission of the trade mark from this pamphlet would result in considerable loss of business to the respondents.

*W. A. Barton K.C.* and *B. L. A. O'Malley* for the respondents. The acts of the respondents were not an infringement of s. 4, sub-s. 1. The law has not been changed by the Act and remains the same as was laid down in *Irving's Yeast-Vite, Ld.* v. *Horsenail.* (1) Even if the terms of s. 4, sub-s. 1, were wide enough to cover the respondents' use of this mark, it was permitted by s. 4, sub-s. 3 (*a*). The words on the face of them merely refer to specific goods of the appellants stocked and offered for sale by the respondents. If the appellants' contention were correct traders would be unable to advertise their goods in the same catalogue or in the same shop window as branded goods with similar qualities. This would be an unreasonable limitation. Where this Act makes innovations it does so clearly and does not leave them to be inferred from dubious phrases. Nowhere in it are there revolutionary changes in trade mark law. Throughout the circular there is the clearest distinction between the appellants' goods and the respondents'.

*Cur. adv. vult.*

(1) (1934) 103 L. J. (Ch.) 106.

1940. May 9. Sir Wilfrid Greene M.R. This appeal raises for the first time a question of importance as to the effect of s. 4 of the Trade Marks Act, 1938. The appellants, who were plaintiffs in the action, claim that this section has made a far reaching alteration in the law relating to trade marks, and enables them to treat certain acts of the respondents as being, what previously to the passing of the statute they would not have been, an infringement of the rights conferred upon the appellants as proprietors of a registered trade mark. Simonds J. before whom the action was tried, was unable to find in the language of the section an intention expressed with sufficient clearness to produce the result claimed, and he accordingly decided this part of the action, the only part now in issue, in favour of the respondents. He held in effect that the section did not in any relevant respect alter the pre-existing law.

The Trade Marks Act, 1938, is entitled: "An Act to "consolidate the Trade Marks Act 1905, the Trade Marks "Act 1919 and the Trade Marks (Amendment) Act 1937." The last of these three Acts never came effectively into force, and it was repealed by the Act of 1938. Nevertheless it was in the Act of 1937, itself an amending Act, that the amendments in the law which now fall for consideration first appeared, and they must be construed accordingly.

Some three years before the passing of the Act of 1937 a Departmental Committee had reported on the Law and Practice Relating to Trade Marks. We were invited to look at this report in order to see what was the mischief to which the Act of 1937 was directed. This suggestion was not pressed and accordingly we did not look at the report.

With these preliminary observations I turn to a short examination of the facts.

The appellants who carry on business in medicinal and pharmaceutical preparations are the registered proprietors of the Trade Mark " Bisurated." There are two registrations both in Class 3 (Schedule III.), the one in respect of " A "medicinal Stomachic Powder for human use," the other in respect of "Chemical substances prepared for use in medicine "and pharmacy."

The respondents carry on a business in medicinal and similar preparations.

Under their trade mark "Bisurated" the appellants sell tablets and powders described as "Bisurated Magnesia "Tablets" and "Bisurated Magnesia Powders." The respondents sell tablets and powders alleged to be similar in chemical content under the description "Bismuthated Magnesia "Tablets" and "Bismuthated Magnesia Powders." This alone would admittedly be no infringement of any right of the appellants. The respondents sell the appellants' tablets and powders as well as their own.

In order to advertise and recommend their bismuthated magnesia tablets and powders, the respondents made use of a poster which invited the reader to "ask for list of over 100 "remedies." The list referred to is identified as the booklet bearing the exhibit mark P4 and was handed to applicants in the respondents' shop. The object of these two documents as appears from their language, was to inform the public that the proprietors of what are commonly called patent medicines charge for their goods prices which are excessive in view of the cost of preparing them, and to induce the public to purchase at a lower price goods sold by the respondents which were in the majority of cases alleged to be compounded to a similar prescription.

The poster claims that the respondents have "devised a "simple way of showing you the comparison between 'Amblin's "'Products' and the highly priced advertised goods which "any intelligent person can understand." It points out the saving which will be effected if the respondents' goods are purchased instead of the advertised patent medicines, and asserts that "The formulæ are the same. The quality is "the same. The price is less." There follows a table in several columns, the first of which gives the name of the respondents' preparation, the second its serial number, the third the complaint for which it is suitable, the fourth and fifth the prices, and the sixth the "Price of Similar Patent

"Medicines." In this table there appears under the serial number 7 a remedy called "Bis Tablets" suitable for stomach digestion at the price of 30 for 6*d.* or 75 for 1*s.* and the price of the "Similar Patent Medicine" is given as 50 for 1*s.* 3*d.* As appears from the booklet P4 the respondents' remedy thus identified was their "Bismuthated Magnesia Tablets," and the price of the "Similar Patent Medicine" was the price of the appellants' Bisurated Magnesia Tablets. The poster also contains the following statement: "All our agents have instructions to return money in full to any customer who does not think our prescriptions *are equally as good or better than the "highly advertised originals.*" I italicize the words which are of special significance.

If the matter had stopped there, the appellants would have had no possible ground for complaining that the respondents had infringed their rights as proprietors of the trade mark "Bisurated" since that word does not appear from beginning to end of the document. But an examination of the booklet, which must be construed in connection with the poster, carries the "simple way of showing the comparison" which the respondents claim to have devised a good deal further. The booklet begins with two pages of text headed "Some Common-"sense Facts about Medicine." It points out the high cost of patent medicines as compared with the cost of manufacture and explains how and why the respondents can sell "the "same thing" at a cheaper price. It states that "We produce "the equivalent of almost every well known and valuable "remedy," and gives the following piece of advice to the public: "If you want the original advertisement remedies, we can "supply them to your order at the full price. If you want "Amblin's remedies, order by number or by Amblin's own "name."

The next ten pages of the booklet contain particulars of remedies in parallel columns, two columns on each page. Four of the pages are headed by captions "Order by number," "See what you save," "Saving shillings saves pounds" and "Our prescriptions save you more than half of your money." On each page the left-hand column is headed "List of "advertised patent remedies sold by us," and the right-hand column "Amblin's Medicine (Brand) Prescriptions." In the left-hand columns are given the names, prices and (in most cases) the alleged analysis of some sixty-eight patent medicines of well known brands, most of them being identified by their trade mark, whether registered or not. In some cases the name of the manufacturer or inventor is given, particularly where the description under which the remedy is commonly known comprises such a name, for example, "Doan's Backache and Kidney Pills."

In the right-hand column there is set out against each remedy mentioned in the left-hand column the name of a remedy sold by the respondents with its price and (in most cases) its alleged analysis and the number of the prescription. The names of these remedies of the respondents are in some cases fancy names, in others descriptive names. Where the analysis of a patent medicine and of the respondents' remedy set against it are both given they are in all or practically all cases identical.

The columns are divided horizontally by lines printed across the pages, with the result that each patent medicine and the respondents' remedy set against it together form, as it were, a separate group. The last two pages of the booklet contain particulars of a number of remedies described as "Amblin's "Special Preparations."

On page 4 of the booklet there appears between horizontal lines a group of two remedies. The remedy described in the left-hand column is "Bisurated Magnesia Tablets," namely, the appellants' preparations of that name. These words are followed by what purports to be the "Analysis" of the remedy and particulars as to price. The remedy described in the right-hand column is "Bismuthated Magnesia Tablets," namely, the respondents' preparation of that name. The prescription number is number 7, which is the same number as that of "Bis Tablets" in the poster. There follows what purports to be the "Analysis" of the remedy which is textually the same as the "Analysis" of the Bisurated Magnesia Tablets set out in the left-hand column. Particulars of the price are given and this is (as in all the other cases in the booklet) substantially lower than that of the corresponding patent medicine.

On page 5 of the booklet is another group, namely, "Bisurated Magnesia Powder" and "Bismuthated Magnesia "Powder" to which similar observations apply except that the prescription number of the latter is number 7a.

One other group is worth noticing for a reason which will appear later. On page 13 of the booklet there is a group consisting of "Yeast-Vite Tablets" (without any analysis) in the left-hand column and "Yeast Life Tablets" (with an analysis) in the right-hand column.

I have set out at some length the salient features of the poster and the booklet since it is essential to the proper understanding of this case to appreciate exactly what these documents are saying to the public. There can, in my view, be no two opinions about this. They are saying as clearly as anything can be said that, whereas the respondents are prepared to sell the various patent medicines described, they are offering and recommending to the public remedies of precisely the same composition and precisely the same virtues at a lower price. In other words, they are saying that the respondents' remedies are exact equivalents of the corresponding patent medicines, that they are not merely substitutes, but substitutes of the same composition and the same efficacy.

If the respondents had confined themselves to statements such as these without identifying the corresponding patent medicine by means of a registered trade mark in cases where it is sold under such a mark, for example, if they had identified the patent medicine only by the name of the manufacturer, it could not be suggested that the proprietor of such a registered trade mark would have had any ground for complaint.

The respondents have not used the registered trade marks of other persons as indicative of the origin of their own goods, and in default of use of this character no case of infringement could have been established against them under the law as it stood before the Act of 1938 came into force. It is said, however, on behalf of the appellants that the respondents' use of the appellants' registered trade mark "Bisurated" although not directed to indicate the origin of the respondents' goods, is nevertheless such as to fall within the definition of infringement in s. 4 of the Act of 1938. This makes it desirable to examine further the implications of what the respondents have done in the poster and the booklet by referring to the appellants' remedies under their registered trade mark.

Here again the matter does not seem to me to be open to doubt. The respondents first of all are using the word "Bisurated" in a trade mark sense, that is, as indicative of the origin of the goods in relation to which reference is made to the trade mark. It is true that the reference is not to the respondents' goods but to the appellants' goods; nevertheless the word "Bisurated" is used in a trade mark sense and not in a descriptive sense as might have been the case if the word had had a descriptive as well as a distinctive significance.

Moreover, the respondents are using the appellants' trade mark as a convenient method of describing the merits of the respondents' own goods. They are in effect saying: "You, "the public, are no doubt familar with 'Bisurated Magnesia,' "and are aware of its virtues; the best method of describing "the virtues of our 'Bismuthated Magnesia' is to tell you "that they are precisely the same as those of 'Bisurated "'Magnesia'—that is all that you need to know." In short, the respondents are using the appellants' trade mark for the purpose of advertising and compendiously describing the virtues of their own goods and thus obtain for themselves a benefit from the reputation enjoyed by the appellants' goods sold under and identified by the appellants' registered trade mark. It is irrelevant to consider this action of the respondents from the point of view of commercial morality. The commercial object of it is manifest. The public who buy branded goods are for the most part ignorant of the name of the manufacturers. It would have profited the respondents little if anything to have described the appellants' goods merely by the appellants' own name as manufacturers without the trade mark since very few persons would have known what was being referred to. Directly the trade mark is used all doubts disappear and the public knows quite well that it is being offered a remedy identical in composition and qualities with the remedy which it knows by the name "Bisurated." It is therefore of substantial commercial importance to the respondents to be able to use the appellants' trade mark in the way in which they have in fact used it. To advertise their own goods on their own merits without reference to the trade mark would admittedly have been a far less profitable course.

Lastly must be noticed the fact that in the booklet the appellants' trade mark is used in relation to the appellants' own goods which the respondents stock and are willing to sell. This use of the mark considered by itself is, of course, unobjectionable. It was argued that this was the only use, but, for the reasons which I have endeavoured to explain, this argument in my view cannot be supported.

I now turn to consider the questions of law involved in the appeal. It is beyond dispute that under the law as it stood before the 1938 Act came into operation, the action of the respondents which I have described would not have amounted to an infringement of the appellants' trade mark. This results from the decision of the House of Lords in *Irving's Yeast-Vite, Ld.* v. *Horsenail* (1), commonly called the "Yeast-"Vite" case. In that case the defendant had exhibited in his shop window placards exhorting the public to purchase his preparations which he described as substitutes for named patent medicines (including Yeast-Vite) made up to the same formulæ. He also sold bottles labelled "Yeast Tablets. A "Substitute for Yeast-Vite." The plaintiffs were the registered proprietors of the trade mark Yeast-Vite and they claimed that the defendant's use of that word in the way described amounted to an infringement. This claim was rejected on the ground that the defendant's use of the mark was not for the purpose of indicating the origin of his goods and therefore did not infringe the right conferred upon the plaintiffs as registered proprietors of the trade mark under the statutes then in force. The ground of the decision is concisely stated in a passage in the speech of Lord Tomlin. He says (1): "The

(1) 103 L. J. (Ch.) 106, 110.

"phrase 'the exclusive right to the use of such trade mark' "carries in my opinion the implication of use of the mark for "the purpose of indicating in relation to the goods upon or in "connection with which the use takes place, the origin of such "goods in the user of the mark by virtue of the matters "indicated in the definition of trade mark contained in s. 3."

It will be seen from my analysis of the respondents' use of the appellants' trade mark in the present case that what the respondents have done is in substance precisely the same as what was done by the defendant in the *Yeast-Vite* case. (1) The only point of difference between the two cases is that in the present case, in addition to the use by the respondents of the trade mark "Bisurated" for the purpose of compendiously describing the merits of their own preparation (which is the use complained of) there is the further use of the trade mark—admittedly innocent—in relation to the actual goods of the appellants. These two uses are quite distinct. The existence of the latter cannot nullify the existence of the former, and an appreciation of this fact is essential to a proper understanding of this case.

It is clear at the outset that if the Act of 1938 has had the effect of making the use now complained of an infringement, a radical alteration has been effected in the law relating to registered trade marks. That law is wholly statutory and is a development of the common law relating to passing off which was based on deceptive use. An infringement of a registered trade mark could only take place if the trade mark was used to indicate the origin of the infringer's goods, such a use being of necessity deceptive. In the use now complained of nothing of the kind is to be found. It is not deceptive in any sense. The goods of the appellants are quite clearly distinguished from those of the respondents; that indeed is the whole sense of the documents to which I have referred. The right now claimed, if it exists, is therefore an entirely new departure in the law of registered trade marks. It confers upon the proprietor a novel type of monopoly for which no consideration is given to the public—as it is in the

(1) 103 L. J. (Ch.) 106.

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case of patents—beyond the fees payable on registration. It gives to the proprietor of a registered trade mark a privilege in which the proprietor of an unregistered mark does not share and prohibits for his benefit a form of trading which had previously been considered unobjectionable and is still unobjectionable except in the one case where a registered trade mark is in question.

While recognizing the fundamental nature of the change in the law which the appellants claim to have been made, I do not find it useful to consider how such a remarkable piece of legislation can have eluded the vigilance of Parliament. My sole task is to construe the language which the Legislature has used; and although in a doubtful case the fact that the alleged change in the law would be far reaching, and indeed revolutionary, may tip the scale, considerations of this kind cannot be allowed to prevail where the language when analysed and construed is shown to lead to such a result. Nor must the fact that the language used is crabbed and involved deter the Court from endeavouring to discover its meaning. Every Act of Parliament must be approached with the conviction that its language is capable of a reasonable construction when carefully examined; and when that language appears in an amending Act and is quite clearly directed to altering the law, it is a policy of despair to say that the language used is so obscure that the law must be said to remain unaffected by it. The present Act must, as I have said, be construed as an amending Act. I am unable to approach its construction with any pre-conceived ideas as to the extent of the amendments intended to be made. An extension of the rights conferred by registration of a trade mark is properly described as an amendment of the law relating to trade marks. How far that extension goes is to be discovered from the language in which the Legislature has expressed its will and not otherwise.

In s. 39 of the Act of 1905 the right conferred upon the proprietor of a registered trade mark is stated to be "the "exclusive right to the use of such trade mark upon or in "connection with the goods in respect of which it is "registered." If therefore A was the registered proprietor of a trade mark for "Chemical substances prepared for use "in medicine and pharmacy" (Class 3) B could not use that trade mark upon or in connection with substances of this character manufactured by B. By this was meant, as appears from the *Yeast-Vite* case (1), that before a use by B of the trade mark in relation to his own goods could amount to an infringement, it must be shown that such use was for the purpose of indicating the origin of these very goods in the user of the mark, that is, B. In the *Yeast-Vite* case (1) the defendant's use was, I should have thought, clearly a use "in relation to" the defendant's own goods, according to the ordinary meaning of that phrase apart from any special context—a meaning which appears to have commended itself to Lord Tomlin in the passage from his speech quoted above. The plaintiff failed because the defendant's use of the mark, although it was a use in relation to the defendant's own goods, was not for the purpose of indicating the origin of those goods in the user of the mark, that is, the defendant.

The definition of the right of the proprietor of a registered trade mark contained in s. 4 of the Act of 1938 is quite different in language. The twenty-four words which I have quoted from s. 39 of the Act of 1905 are replaced by the two hundred and fifty-five words of sub-s. 1 if my addition is correct. Even this figure is vastly exceeded if the other sub-sections, which consist largely of definition, are included. So formidable an alteration may legitimately be supposed to have been intended by the Legislature to produce some concrete result. The definition in sub-s. 1 falls into two parts; the first part gives a general definition of the exclusive right of the proprietor; the second part gives two special instances "without prejudice to the generality of the fore-"going words" in which the right is to be deemed to be infringed. The first part of the definition is in the following words: "The exclusive right to the use of the trade mark "in relation to these goods," and by sub-s. 2 of s. 68 this reference to use in relation to goods is to be construed as a reference to use "upon or in physical or other relation to "goods." If this had been the only alteration effected by the Act of 1938 I could have understood an argument to the effect that the law as laid down in the *Yeast-Vite* case (1) remained unaffected in spite of the change in phraseology and in spite of the wide meaning given to the phrase "in "relation to." But as will be seen there are provisions in the second part of the definition which are most relevant to the construction of the first part and make it in my opinion impossible to treat the language of the first part as identical in effect with that used in the earlier Act.

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(1) 103 L. J. (Ch.) 106.

The second part of the definition gives two particular cases of use "in relation to" goods which are to be deemed to be infringements. Such use will be an infringement if it takes place "in such manner as to render the use of the "mark likely to be taken either (*a*) as being use as a trade "mark; or (*b*) in a case in which the use is use upon the goods or "in physical relation thereto or in an advertising circular or "other advertisement issued to the public, as importing a "reference to some person having the right either as pro-"prietor or as registered user to use the trade mark or to "goods with which such a person as aforesaid is connected "in the course of trade."

Now the use mentioned under head (*a*) is quite clearly a use by the alleged infringer in relation to his own goods which is likely to be taken as being use as a trade mark for his own goods, that is, to use Lord Tomlin's words "as indicating "in relation to" those goods "the origin of" them "in the "user of the mark," that is, the alleged infringer. This, therefore, is the old type of infringement. But the use mentioned under head (*b*) is altogether different. It is expressed in the alternative and it would not be in accordance with any rule of construction to attribute to the language of head (*b*) a meaning identical with that of head (*a*). In my opinion it is clear that head (*b*) is intended to deal with a class of use which is not already covered by head (*a*); and, as head (*a*) completely covers what I have called the old type

(1) 103 L. J. (Ch.) 106.

of infringement, it follows that head (*b*) must be dealing with a type of use which is not a use indicating the origin of the goods in the infringer. Moreover, as this type of use is a use "in relation to" the goods of the infringer, it follows that the words "use in relation to" in both parts of the definition cannot be confined to a use in relation to those goods for the purpose of indicating their origin in the infringer. Once it appears that there may be a wrongful use of a trade mark "in relation to goods" (namely, the goods of the alleged infringer) which is not a use as a trade mark in reference to those goods, that is, as indicating the origin of those goods in the alleged infringer, all reason for giving a limited construction to the words "in relation to" disappears. I have already expressed the view that according to the ordinary meaning of the words apart from any special context, the respondents' use of the trade mark "Bisurated" which is complained of is a use "in relation to" the respondents' own goods. It is for the purpose of describing the virtues of those goods that the mark is used. The public is invited to compare "Bisurated" goods with "Bismuthated" goods and is told that the latter are identical with the former save in the matter of price.

I am of opinion therefore that the respondents have infringed the exclusive right of the appellants as defined in the first part of s. 4, sub-s. 1. But they have also in my judgment been guilty of infringement under paragraph (*b*) of the second part of the sub-section. The language of that paragraph is turgid and diffuse. But a patient examination makes it possible to discover its meaning. In order to bring himself within this paragraph there must be a use of "a mark"—not, be it observed, of a "trade mark"—"identical with the "registered trade mark or so nearly resembling it as to be "likely to deceive or cause confusion." The respondents have used the mark "Bisurated" in two ways, one a legitimate way as the trade mark of the appellants' goods, the other (with which we are now concerned) as a mark forming by reference part of the description of their own goods. Next the use must be in the course of trade. This condition is satisfied. Next the use must be "in relation to any goods "in respect of which it is registered." The use complained of is in relation to the identical class of goods. Next the use must be "upon the goods or in physical relation thereto "or in an advertising circular or other advertisement issued "to the public"—this excludes all other forms of relationship covered by the definition of "in relation to" contained in s. 68, sub-s. 2. This condition has been complied with. Next the mark must be used "in such manner as to render "the use of the mark likely to be taken as importing a "reference to some person having the right either as proprietor or as registered user to use the trade mark or to "goods with which such a person as aforesaid is connected "in the course of trade." The persons having the right as proprietors to use the trade mark "Bisurated" are the appellants. "Bisurated" goods are goods with which the appellants are connected in the course of trade. Does the use complained of import a reference to the appellants' "Bisurated" goods? Manifestly, since it is the whole object of that use that it should do so.

The language which I have just quoted is far from happy. In substance what is meant, as it appears to me, is that the mark must be used in what I may call a trade mark sense, not, of course, as a trade mark for the infringer's own goods (that is provided for by paragraph (*a*)), but as a trade mark identifying the complainant's goods, as the trade mark "Yeast-Vite" was used in the *Yeast-Vite* case (1), and as the trade mark "Bisurated" is used in the present case. The reason why it is only use in a trade mark sense which falls under paragraph (*b*) is, I think, fairly obvious. The use must be use of a "mark" and a mark is defined in s. 68, sub-s. 1, as including among other things a "word." If paragraph (*b*) had not been confined to use of a mark in a trade mark sense it might well have followed that the use in a non-trade mark sense of a word which happened to be a trade mark would have been an infringement. Thus let it be supposed that a shoe manufacturer had succeeded in

(1) 103 L. J. (Ch.) 106.

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registering the word "Crocodile" as a trade mark. It might have been said that another manufacturer would have been unable to describe his shoes as "made of crocodile" skin. Under paragraph (*b*) as it stands such a description would be unobjectionable. But if he went on to say that his shoes were as good as the "Crocodile" brand shoes he would be using the word "Crocodile" in a different sense, namely, a trade mark sense and not a merely descriptive one. A similar example suggests itself in reference to the well known "Sheen" mark for sewing cotton: *In re J. & P. Coats, Ld.'s Application.* (1)

Another argument was founded upon the language of sub-s. 3 (*a*) of s. 4, which provides that certain acts shall not be deemed to be infringements. It was said that even if the language of s. 4, sub-s. 1, is wide enough in itself to cover what the respondents have done it is counteracted by para. (*a*) of sub-s. 3 in that the use which the respondents have made of the appellants' mark is the use permitted by that paragraph. This argument in my opinion is founded on a fallacy. Para. (*a*) is a verbose piece of drafting, but its effect shortly stated appears to me to be to exclude from the category of infringing acts what would otherwise have fallen within the wide scope of sub-s. 1, namely, the use of a trade mark upon the goods of the proprietor with his consent express or implied. The scheme of s. 4 as a matter of drafting is I think clearly to include within the scope of sub-s. 1 every use of a mark and then to exclude from its operation by the following sub-sections various types of use including the every day type of use described in para. (*a*). There is no question that the respondents have used the appellants' trade mark in the way described in para. (*a*) for they sell the appellants' goods upon which the trade mark "Bisurated" has been placed by the appellants themselves. But as I have already pointed out this is only one use which the respondents have made of the appellants' mark and no complaint is or could be made with regard to it. The other use which the respondents have made of the mark is entirely different in character and purpose. The circumstances that the one use is made legitimate by para. (*a*) of sub-s. 3 cannot possibly be treated as a justification for the other.

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(1) (1936) 155 L. T. 127.

One last argument may be mentioned. It was said on behalf of the respondents that if the appellants are right, traders would find their activities outrageously circumscribed. For example, it was said that they could not advertise in one and the same catalogue or display in one and the same shop window their own goods and branded goods of similar qualities. This argument does not alarm me. Whether or not a particular use of the complainant's trade mark is a use "in relation to" the alleged infringer's goods within the meaning of the sub-section must in my view depend upon the facts of each individual case. In the present case the facts which I have analysed in the earlier part of this judgment present no difficulty to my mind.

I conclude, therefore, that the effect of this legislation is to alter the law as laid down in the *Yeast-Vite* case (1) and to make what the respondents have done an infringement. It is interesting to observe that the first part of this conclusion agrees with the view taken by the respondents themselves and, I dare say, by traders in general. In their poster they say that " the Millionaire Patent Medicine Firms have secretly "got an Act passed which makes it illegal for us to mention "the names of Patent Medicines in comparison with our "copies so that we cannot say for instance: ' 30 tablets "' Amblo 6*d*. sold to compete with 10 tablets so-and-so at "' 6*d*.' " They then proceed to state that they have found a " simple way " of showing the comparison. Unfortunately for them this " simple way " has not enabled them to circumvent the statute.

I do not add to the length of this judgment by examining in detail the reasoning of Simonds J., from whom, with all respect, I am differing. My reasons for disagreeing with the view which he took are, I hope, sufficiently apparent from what I have said. In my judgment the appeal should be allowed.

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(1) 103 L. J. (Ch.) 106.

MacKinnon L.J. The plaintiffs are the makers and proprietors of a medical preparation which they call Bisurated Magnesia. The defendants are dealers in, and manufacturers of, various medicinal preparations. The defendants issued to the public a pamphlet. In this they point out that, as very large sums are spent in advertising proprietary medicines, the price charged for them has to be much in excess of a reasonable profit upon the cost of their materials. The pamphlet goes on to state that the defendants are ready to supply any of these proprietary brands at the prices fixed by their proprietors. But having specified the chemical analysis of each of these the defendants go on to offer to supply a product of their own, of the same analysis, at a much cheaper price. Thus, as regards the plaintiffs' product "Bisurated "Magnesia Tablets," they offer to sell the plaintiffs' product at their own price, namely, at 1*s.* 3d. for about fifty tablets. They state the analysis under four heads. Opposite to this offer of the plaintiffs' tablets there is printed: "Prescription "No. 7, Bismuthated Magnesia Tablets." The analysis is given and is identical with the former one. These "Bismuthated Magnesia Tablets" the defendants offer to sell at the price of 6d. for thirty tablets, or 1*s.* 0*d.* for seventy-five.

This is obviously a display of sharp business competition by the defendants. When I say "sharp" I do not mean to suggest impropriety, underhandedness, or any sort of immorality. But I am concerned with a question of law, and the moral aspect of the activities of either plaintiffs or defendants is quite irrelevant.

The plaintiffs allege that what the defendants have done in issuing this pamphlet is more than the exercise of keen competition in business. They say that it constitutes an infringement of a legal right of the plaintiffs, that the defendants can be restrained from such infringement and are liable for damages for it. The plaintiffs do not suggest that, on the facts I have so far stated, the defendants have infringed any legal right of the plaintiffs existing at common law or in equity.

There is, however, one further fact to be stated. The word "Bisurated," besides being part of the name applied by the plaintiffs to their product, was in 1912 registered by the plaintiffs as a trade mark under the Trade Marks Act, 1905. It is because of this further fact that the plaintiffs allege that they possess the legal right I have specified.

The plaintiffs agree that under the Trade Marks Acts as they existed before 1938 (that is, those of 1905 and 1919) this legal right did not exist. Such an admission is clearly necessitated by the decision of the House of Lords in *Irving's Yeast-Vite, Ld.* v. *Horsenail.* (1) But the plaintiffs contend that they have been clothed with a newly created legal right by virtue of the provisions of the Act of 1938, which is entitled "An Act to consolidate the Trade Marks Act, 1905, the Trade "Marks Act, 1919, and the Trade Marks (Amendment) Act, "1937." This novel legal right, they say, has been conferred upon them by s. 4 of the Act of 1938; and that section, they say, has overruled the decision in *Irving's Yeast-Vite, Ld.* v. *Horsenail.* (1)

Our task, therefore, has been solely to examine, with laborious iteration, the language of this Act of 1938 and, in particular, of its s. 4.

Before I proceed to that examination I may perhaps be permitted to point out that the Act of 1938 purports to be, and is, a consolidation Act. So far as the Acts of 1905 and 1919 were amended that was done by the Trade Marks (Amendment) Act, 1937. By the combined effect of s. 33, sub-s. 5, of the Act of 1937, and s. 71, sub-s. 2, of the Act of 1938, the Act of 1937 has never had any effective existence at all. The Law Reports volume of statutes of 1937 contains 1039 pages of public statutes. That distressing bulk is partly created by the 49 pages of this still-born "Trade Marks "(Amendment) Act, 1937." The volume of 950 pages for 1938 is enriched by 58 pages of the Consolidation Act of 1938. I hope it is not improper for me to express my regret that the exigencies of parliamentary procedure have to result in this lamentable waste.

This new legal right, consequent on their registration of the trade mark "Bisurated," is said to have been conferred upon the plaintiffs by s. 4 of the Act of 1938. That section seems to be primarily in substitution for s. 39 of the Act of 1905.

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In the course of three days hearing of this case I have, I suppose, heard s. 4 of the Act of 1938 read, or have read it for myself, dozens if not hundreds of times. Despite this iteration I must confess that, reading it through once again, I have very little notion of what the section is intended to convey, and particularly the sentence of two hundred and fifty-three words, as I make them, which constitutes sub-s. 1. I doubt if the entire statute book could be successfully searched for a sentence of equal length which is of more fuliginous obscurity.

It is an elementary rule for the construction of statutes that one should presume "that the Legislature does not intend "to make any substantial alteration in the law beyond what it "explicitly declares either in express terms or by clear "implication. . . . . It is in the last degree improbable that "the Legislature would infringe rights or depart from the "general system of the law without expressing its intention "with irresistable clearness." That quotation is from Maxwell, The Interpretation of Statutes, 8th ed. (1937), p. 73. It is manifest that the plaintiffs cannot say that the Legislature has created the new legal right they claim and overruled the Yeast-Vite decision explicitly, in clear terms or by clear implication; still less that it has done so "with irresistible "clearness."

I dared to write above that the repeated perusal of sub-s. 1 of s. 4 leaves me without any clear notion of its meaning and effect. Some glimmer of illumination appears to be provided by sub-s. 3 (*a*). The qualification, or limitation, of the effect of sub-s. 1 there expressed would appear to suggest that if sub-s. 1 stood alone it would be an offence if any human being, other than the registered proprietor of a trade mark, ever bought or sold or even had in his possession goods to which that proprietor had affixed the mark. I confess that I should never have dreamed that sub-s. 1 could have this astonishing effect; nor do I believe it ever could do so. But the fact that the draftsman thought it necessary to guard against such a supposition seems to be a signal proof of his success in making a masterpiece of obscurity in his sub-s. 1.

As I have said, s. 4 of the 1938 Act takes the place of s. 39 of the Act of 1905. One alteration of language, to which the argument for the plaintiffs attached immense importance, is the substitution of the words "in relation to those goods" for the former words "upon or in connection with the goods." It is true (if I may again quote Maxwell, at p. 278) "where "the words of an amending Act have been enlarged the "inference is that the enlargement must have been intentional "on the part of the Legislature"; but I confess I can see no enlargement, or any essential change of intention, in the substitution of "in relation to" for the words "in connection "with." The omission of "upon the goods" is no doubt a real alteration; but I see no real difference between "in "relation to" and "in connection with." The draftsman of this 1938 Act appears to have a liking for the phrase "in "relation to." He uses it elsewhere, when I think he might just as well have said "in connection with"; for example, in s. 68, sub-s. 1, in the definitions of "limitations" (twice), "prescribed," "trade mark" (three times), while in s. 68, sub-s. 2, he uses the words twice, enlarging them the second time to "in physical or other relation to."

The appellants contend that this s. 4 of the 1938 Act has altered the law as it existed under the 1905 Act as interpreted by the House of Lords in the *Yeast-Vite* case (1); and they are bold enough, or are constrained, to assert that it was the intention of the Legislature to effect this alteration. I have already suggested that if it is contended that a statute has altered the law, those who make the assertion should be able to point to clear language that achieves that result. It is, I think, also desirable to recall the four leading rules for the construction of statutes that were enunciated by Sir Edward Coke in *Heydon's Case* (2): first, what was the law before; second, what was the mischief or defect for which the law had

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(2) (1584) 3 Rep. 7 b.

not provided; third, what remedy has Parliament appointed; and, fourth, the reason for the remedy.

In earlier days, when the conciseness of substantive enactment made such an addition practicable, the second and fourth of these questions were commonly answered by a preamble. If the appellants are right in their contention that, by this s. 4, the law has been altered and the *Yeast-Vite* case (1) overruled, what would have been the preamble specifying the mischief or defect in the law that it was desirable to remedy? I am, for my part, unable to imagine its terms; but I can conceive a more cynical person suggesting this: "Whereas the business of the proprietors of quack medicines "in fleecing the public has been unduly hampered by the "decision in the *Yeast-Vite* case (1), and whereas it is in the "national interest that this obstacle shall be removed."

The appellants have failed to satisfy me that the language of dark and tortuous prolixity in this s. 4 makes that which the respondents did, in issuing their pamphlet, a breach of a newly created legal right of the appellants; and I should wish to dismiss this appeal, in agreement with the decision of Simonds J., but differing, unhappily, from my brethren.

Ultimately, I believe, the difference between us is largely one of fact. Whatever the meaning of s. 4, the offence committed by one who infringes the rights of the proprietor of a registered trade mark must surely be his use of that trade mark "in connection with" or "in relation to" his, the alleged infringer's, goods. I cannot see that in the pamphlet the defendants can be said to use the word "Bisurated," "in relation to" their, the defendants', goods. They do use the word "Bisurated" in relation to the plaintiffs' goods, which they offer to sell. They go on to say they have goods of their own which they are willing to sell; but these goods, so far as they use any word or adjective "in relation to" them, are described as "Bismuthated Tablets."

Put in another way, this means that, so far as in their pamphlet the defendants have used the word "Bisurated" "in relation to" any goods, they have done so in relation to

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the goods of the plaintiffs and in relation to no other goods; and this, notwithstanding anything that can possibly be meant by sub-ss. 1 and 2 of s. 4 is a thing permitted to the defendants by sub-s. 3 (*a*).

Lord Campbell, in his Lives of the Lord Chancellors, 1st ed., vol. i., p. 272, speaking of the practice in the reign of Edward III., says that in 1366 Thorpe C.J. and one of his puisnes, "went to the House of Lords . . . . and asked them, "as they had lately passed a statute of jeofails, what they "intended thereby. Such questions, which were frequent in this "reign, must have been answered by the Chancellor." If this practice were revived, the Lord Chancellor might have a crowded daily levee of inquiring judges. As it is, perhaps an appeal by the present respondents may elicit from the House of Lords "what they intended" by s. 4 of this Act of 1938.

Clauson L.J. The plaintiffs and the defendants are competitors in the business of dealing in " chemical substances "prepared for use in medicine or pharmacy." The plaintiffs are registered owners of a Trade Mark No. 561,459, consisting of the word " Bisurated," registered in the year 1935 in respect of that class of substances. They are also registered owners of a precisely similar trade mark No. 340,411, registered in 1912 in respect of " a medicinal stomachic powder for human "use." It was not suggested before this Court that their rights in respect of these two trade marks were to be differentiated for the purposes of the present case. For the sake of clarity I propose, however, to deal with the matter as though the only relevant trade mark were No. 561,459, registered in 1935 in respect of " Chemical substances prepared "for use in medicine or pharmacy."

In the present action the plaintiffs claimed relief against infringement of trade mark and passing off. Simonds J. granted an injunction in respect of passing off. Against that part of the order there is no appeal. He, however, refused an injunction in respect of infringement, and this appeal is concerned solely with the question whether he was right in this refusal.

The infringement complained of consisted of the issue by the defendants to the public of certain advertising matter. The contents of the documents are stated in detail in the learned judge's judgment, and I do not propose to repeat them. The learned judge sums up the contents as follows (1): "It will be noted that the defendants do not by any means "seek to describe goods of their own manufacture by the "plaintiffs' mark. On the contrary, they emphasize the "distinction between their own and the plaintiffs' goods, "saying in effect to the public: 'You can have the plaintiffs' "goods, or ours; ours are just the same as theirs and are "much cheaper.'" I adopt this summary of the advertisement as correct, adding, however, that in the advertisement the defendants in the course of trade (i.) refer to chemical substances prepared for use in medicine and pharmacy and compare some of such substances, namely, those made by the plaintiffs, with others of such substances, namely, those made by the defendants; and (ii.) use, for the purpose of making this comparison, and in relation to chemical substances prepared for use in medicine and pharmacy, the word "Bisurated" as importing a reference to goods marketed by the plaintiffs or, in other words, to goods with which the plaintiffs are connected in the course of trade.

It is not suggested that this claim for infringement could have been sustained before the coming into operation of those sections of the Trade Marks Act, 1938, which reproduce the Trade Marks (Amendment) Act, 1937. Before that date it is by no means clear—see, however, on this point, *Jay* v. *Ladler* (2)—that the use of the plaintiffs' trade mark in an advertisement issued by the defendants could have amounted to infringement; but whether that would have been so or not it is clear, having regard to the language used in s. 39 of the Trade Marks Act, 1905, and to the decision of the House of Lords in *Irving's Yeast-Vite, Ld.* v. *Horsenail* (3), that before that date there could be no infringement unless the use of the mark by the defendants indicated that the origin of the goods

(1) Ante, pp. 225, 230.
(2) (1888) 40 Ch. D. 649.
(3) 103 L. J. (Ch.) 106.

upon or in connection with which it was used was in the infringer. The question before Simonds J. and this Court is whether on the true construction of the new legislation, and in particular s. 4 of the Act of 1938, the law has been changed so as to extend infringement to cover such a case as the present.

Before dealing with s. 4 it may be useful to observe that in the new legislation the phrase "trade mark" is given a new definition. That phrase is defined in the earlier legislation (omitting words which may for the present purpose be treated as irrelevant) as "a mark used upon or in "connection with goods for the purpose of indicating that "they are the goods of the proprietor of such trade mark "by virtue of manufacture, selection, dealing with or offering "for sale." In the new legislation the phrase is defined (with like omissions) as "a mark used in relation to goods for the "purpose of indicating or so as to indicate a connection in "the course of trade between the goods and some person "having the right as proprietor to use the mark." That definition still, as I read it, treats a trade mark as something which indicates origin, but whereas the old definition contemplates that the trade mark is to be used upon or in connection with goods as an indication of origin, the new definition contemplates that the trade mark may be used not only upon or in connection with goods, but "in relation to "goods." The old phrase "in connection with goods" seems, prima facie, to be intended to deal with the case where for physical reasons the mark cannot be impressed on the goods but is used in such connection as (for example, by impression on a container or in some similar way) to manifest that the mark is used as an indication of the origin of the particular physical object in connection with which the mark is used. The phrase " in relation to " would seem to be used in order to cover the case of the use of a mark in an advertisement where there is no impression of the mark on an object, nor is there such a connection as, in view of physical facts, is a near substitute for such an impression, but the mark is used to indicate the origin not of a specific physical object offered for sale but of the goods advertised; that is, of the products, whether at the moment in physical existence or not, which have or will have their origin in the owner of the mark. In view of the use of this phrase " in relation to " in the section (namely, s. 4 of the Act of 1938) on which this case turns, the change in the language used to define a trade mark is, in my view, not unimportant.

Turning now to s. 4, it is convenient in the first place to consider sub-s. 1 in isolation from the remaining sub-sections of s. 4. The first words which fall to be construed are " use "of the trade mark in relation to " goods in respect of which the trade mark is registered. Simonds J. takes the view that " in relation to " is a phrase which has the same meaning as the words " upon or in connection with " in s. 39 of the Act of 1905. Here I must part company with him. The words " in relation to " seem to have been deliberately used by the Legislature in place of the words "upon or in connection with." If my observations on the phrase " in relation to " as it occurs in the new definition of " trade mark " are correct, the first eight lines of sub-s. 1 would appear to confer on the registered owner of a trade mark not only a monopoly in the word composing the trade mark where that word is used " upon or in "connection with" a specific physical object, but also a monopoly of the use of that word where it appears, divorced altogether of any connection with a specific physical object, in an advertisement which mentions the products of the owner of the mark. It is important in this connection to form a clear view of the meaning of the words " any goods " in the sixth line of the section, and of the words " those goods " in the eighth line. In my judgment the words " any goods " in the sixth line, and consequently the words " those goods " in the eighth line, mean " goods of the class in respect of which "the trade mark is registered." Thus, taking the facts of the present case and applying the words of the first eight lines of s. 4 to those facts, the enactment paraphrased reads as follows: " The registration of the plaintiffs as proprietors of "the trade mark ' Bisurated ' in respect of ' Chemical sub- " ' stances prepared for use in medicine and pharmacy,' gives "them the exclusive right to the use of the word 'Bisurated' "in relation to 'chemical substances prepared for use in " 'medicine and pharmacy'."

If the section had stopped at this point it may be that there would still be a point open for argument. It may be that it could have been contended, as indeed it was strenuously contended as well before Simonds J. as in this Court, that this exclusive right must be treated not as a monopoly of the use of a particular word in the English language but as a monopoly of the use of the word only as indicating the origin of goods in the person using the word; but a consideration of the rest of the sub-section appears to me to make it clear that this contention is erroneous. The words from the eighth line to the end of the section show that the Legislature intends to provide that the monopoly is infringed by the use of the word in the course of trade not only (clause *a*) where the word is being used as a trade mark, i.e., as I understand it, as an indication of origin of specific goods in the person who uses the word, but also in another case which is set out in clause (*b*). The material words of the section in the case covered by clause (*b*) as applied to the facts of the present case may be paraphrased as follows: "the plaintiffs' rights are infringed by the "defendants if the defendants use the word 'Bisurated' in "the course of trade in an advertisement in relation to any "chemical substances prepared for use in medicine or pharmacy "in such a manner as to render the use of the word 'Bisurated' "as likely to be taken as referring to the plaintiffs or to the "plaintiffs' goods."

So far I have dealt with sub-s. 1 of s. 4 in isolation; but it is necessary to go on to consider sub-s. 3, which enacts that, under certain circumstances, that which is there indicated is not to be treated as an infringement. Again I will take the material words and apply them to the facts of the present case. The effect of sub-s. 3 in regard to the present case appears to me to be to provide that the monopoly in the use of the word "Bisurated" given to the plaintiffs by sub-s. 1 is not infringed by the use of the mark by the defendants in relation to goods of the plaintiffs to which the plaintiffs have applied the mark; that is to say, to specific articles which have been so treated. Sub-s. 3 (*a*) does not seem to me to deal with anything but the user of a trade mark in relation to specific existing goods to which the trade mark has been applied.

I now turn back to the impugned advertisements. It is quite clear, as Simonds J. pointed out, that in them the word "Bisurated" is not used as indicating origin of any goods in the defendants and, accordingly, had the old law applied the plaintiffs would necessarily fail. Further, it is, I venture to think, clear, and indeed this is merely a statement of the same proposition in other words, that the word "Bisurated" is not used by the defendants in the advertisements as a trade mark, that is to say, as indicating origin in the defendants of the goods mentioned, and, accordingly, that the case is not covered by s. 4, sub-s. 1 (*a*). But the question is whether the case is covered by s. 4, sub-s. 1 (*b*). If my preceding observations are accurate, it follows that the case is so covered and that, unless something to protect the defendants is to be found elsewhere in the Act, the plaintiffs must succeed. It is true that the effect of the construction thus placed on the sub-section is to confer on the plaintiffs a right crucially different in principle from the rights heretofore enjoyed by the owners of trade marks. It is, however, to be observed that if the Legislature thought that the plaintiffs in the case of *Irving's Yeast-Vite, Ld.* v. *Horsenail* (1) had a real grievance against the defendants in that case, and if the Legislature desired to remedy that grievance, they have, on the construction placed by me on this sub-section, effectually remedied it.

It remains necessary, however, to deal further with s. 4, sub-s. 3 (*a*). I will not repeat my observations on that sub-section. It may be, and indeed was, as I understood, suggested that the advertisements are protected by this sub-section because on their true construction they merely refer to specific goods of the plaintiffs stocked by and offered for sale by the defendants. Such a reference, it is said, is

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specifically permitted by the section. "What is wrong," it may be said, "in referring by the trade mark to the goods "on which the plaintiffs have put the mark, which goods we "have bought from them and we are by our advertisements "offering to sell to the public?" I cannot help thinking that it was on this argument that, commercially speaking, the defendants pinned their hopes when they drafted the impugned advertisements. In my view the answer to this argument is to be found in the terms of the advertisements as properly construed. It is perfectly true that in the advertisements the defendants use the word "Bisurated" in relation to specific goods of the plaintiffs to which the plaintiffs have applied the trade mark; and in regard to that part of the advertisements it may well be the fact that no infringement has been committed; but on a careful consideration of the terms of the advertisements it becomes, in my judgment, plain that, while it may well be that the advertisements contain a genuine offer of the plaintiffs' goods under the plaintiffs' mark and that so far there is no infringement, the defendants in the advertisements go beyond that and proceed to make a further statement in terms which are plainly to be gathered from a comparison between the prefatory matter and the tabulated list and might well be gathered from the mere arrangement of the tabulated list of medicines in parallel columns. That statement is that the defendants' bismuthated magnesia tablets are the equivalent of and cheaper than something which the defendants describe by the use of the word "Bisurated." I can see no escape from the conclusion that that is a separate statement in which the defendants use the word "Bisurated" as importing a reference to the plaintiffs' Bisurated tablets generally and not merely to the specific articles existing in the defendants' stock, and that the user of the word "Bisurated" is other than and goes beyond a mere user of the word in relation to specific existing goods on which the plaintiffs have placed their mark.

I thus reach the conclusion that, as the law now stands, the plaintiffs are entitled to succeed in their claim for an injunction to restrain infringement of their trade mark

"Bisurated." I have, as I have already explained, dealt specifically only with the mark registered in 1935; but I can see no distinction between the rights arising from the registration of that mark and those arising from the registration of the earlier mark.

In my judgment the plaintiffs are entitled to a reversal of the refusal of the learned judge to grant them an injunction against infringement and are entitled to obtain from this Court the usual order restraining infringement of their mark.

*Appeal allowed.*

Solicitors: *McKenna & Co.; Edward Davis, Nelson & Co.*

F. C.

FARWELL J.

1940
June 4.

## *Ex parte* THE MIDLAND RAILWAY COMPANY.

## *In re* THE ESTATE OF THOMAS MILWARD (DECEASED).

## *In re* MIDLAND RAILWAY (ADDITIONAL POWERS) ACT, 1872.

## *In re* LANDS CLAUSES CONSOLIDATION ACT, 1845.

[Adjourned into Court by Master Mosse. No number of record.]

*Will—Construction—Devise of fee simple—Gift over on devisee's death "leaving no child or children"—Power of Court in a proper case to read "child or children" as "issue."*

In Jarman on Wills, 7th ed., vol. iii., p. 1698, it is stated: "Where land is devised to A absolutely, subject to a gift over "in the event of his dying and leaving no child or children, "'child or children' is read as meaning 'issue,' so that the gift "over does not take effect if A leaves issue living at his death."

In Theobald on Wills, 9th ed., p. 589, it is stated: "In many "cases, where an estate in fee is given, followed by a gift over "in the event of the devisee dying without children, the word "children has been construed as synonymous with issue."

The statement in Jarman is too wide. The statement in Theobald, although somewhat similar, is very much less widely expressed. The learned editor says that there are cases where the word "children" has been construed as synonymous with "issue," but he does not state that there is a definite rule binding the Court so to read the words "child or children": and it is not correct to say that they must bear that meaning.

The Court will, however, in the exercise of its discretion, construe the expression "child or children" in a will as meaning "issue," if it is satisfied that the expression was used with that meaning and that to construe it strictly would defeat the true intent of the will.

*Doe d. Smith* v. *Webber* (1818) 1 B. & Ald. 713, *Doe d. Blesard* v. *Simpson* (1842) 3 Man. & G. 929, and *Parker* v. *Birks* (1854) 1 K. & J. 156, considered.

ADJOURNED SUMMONS.

This was an application for payment out of a fund in Court to the Reverend James Price Roscommon Thomas Bacon Bacon-Phillips (hereinafter called "the first applicant"), as sole personal representative of Mrs. Emma Stoppard Shipley (hereinafter called "the beneficiary"), who died in 1920.

The fund consisted of investments made in 1877 by order of the Court with the proceeds of sale in 1877, to the Midland Railway Company, of part of land devised to the beneficiary by Thomas Milward (hereinafter called "the testator"), who died in or about 1851, and consisted also of accumulations of the income of the investments since the beneficiary's death in 1920.

By his will, dated August 26, 1850, the testator provided, inter alia: "I then give will and devise unto Emma Stoppard "Milward the natural daughter of my late son John Milward "the whole of my freehold estate . . . . situate . . . . near "to Alsworth . . . . in the County of Nottingham . . . . "I devise the whole thereof to the said Emma Stoppard "Milward to her own sole use and benefit and at her disposal "subject to the payment of two shillings and six pence per "week and every week to my faithful servant Mary Buxton "if she continues to live with me until my decease . . . . "And then the whole of my real estate to be the property of "the said Emma Stoppard Milward providing nevertheless "should the said Emma Stoppard Milward depart this life "leaving no child or children then I will and devise that the "whole of my real estate shall be sold . . . . and the proceeds "arising from such sale or sales after payment of all reasonable "expenses shall be divided amongst all the grandchildren of "my brother John Milward which (*sic*) shall then be living "share and share alike."

Mary Buxton died in 1865. In or about 1877, the Midland Railway Company bought, for 275*l*., part of the land included in the testator's devise to the beneficiary. Pursuant to s. 69 of the Lands Clauses Consolidation Act, 1845, the 275*l*. was paid into Court to the credit of "*Ex parte* the Midland Railway "Company in the matter of *ex parte* the Midland Railway "Company (Additional Powers) Act, 1872, in respect of lands "claimed by Emma Stoppard Shipley for a defeasible estate "in fee simple without power of sale." By order of the Court it was invested in India 4 per cent. Stock to the credit of "*Ex parte* the Midland Railway Company in the matter of "the estate of Thomas Milward deceased" and it was ordered also that the dividends on the stock be paid to the beneficiary for her life or until further order.

The beneficiary had one child, Mary Elizabeth Shipley (hereinafter called "Mary") born on June 11, 1853. On June 9, 1877, Mary married James Price Phillips, who later took the name Bacon-Phillips. They had two children, namely, the first applicant, born on June 26, 1881, and a daughter, Gladys Kathleen (hereinafter called "Gladys") born on May 19, 1886.

By her will dated May 31, 1913, the beneficiary appointed the first applicant her sole executor, and gave all she possessed to Mary for life and at her death to pass to her children in equal portions.

On May 2, 1917, Mary died, and on March 29, 1920, the beneficiary died.

By virtue of the provisions of the Railways Act, 1921, the rights and liabilities of the Midland Railway Company became vested in the London Midland and Scottish Railway Company.

On February 14, 1927, Gladys died, intestate, and on October 29, 1938, letters of administration were granted to Frank Bentham Stevens, the second applicant on this summons (hereinafter called "the second applicant"). On May 14, 1938, James Price Bacon-Phillips died, and on July 29, 1938, probate of his will was granted to the first applicant, the second applicant, and one other person.

By this summons, taken out on February 23, 1939, and subsequently amended, the first applicant as the beneficiary's sole personal representative, and the second applicant as personal representative of James Price Bacon-Phillips, asked that the stock in Court might be transferred to the first applicant, and that the sum of cash in Court representing accumulations of dividends thereon might, after payment thereout of death duties, be paid to him as the beneficiary's personal representative. They contended that the payment out should be made on the footing that the beneficiary, in the events which had happened, was absolutely entitled to the property in fee simple, and also to the money representing the proceeds of sale.

The summons also asked that the Official Solicitor be appointed to represent, for the purposes of the application, all children who might be beneficially interested as grandchildren, or remoter issue, of the testator's brother, whether personally or by representation, of the testator's brother's estate: and it asked that, pursuant to s. 80 of the Lands Clauses Consolidation Act, 1845, the London Midland and Scottish Railway Company might be ordered to pay to the first applicant his costs as therein provided for, including all reasonable charges and expenses of the application, and of all expenses relating thereto.

*Raymond Jennings* for the applicants. The Court will construe the words "child or children" as meaning "issue" where it considers it necessary to do so: *Parker* v. *Birks* (1), *Doe d. Blesard* v. *Simpson.* (2) *In re Synge's Trusts* (3) relies on those cases, and extends to personal property the principle which they apply.

The rules of construction in those cases do not bind the Court to act on them without considering the construction of each will: but all these old authorities apply with great force to the present case, because there is no reason why this lady should have desired to disinherit remoter issue if her daughter happened to die leaving remoter issue.

*E. M. Winterbotham* for the Official Solicitor. If the will be construed according to its natural meaning, there is a gift over. The natural meaning must be given, even though it may seem that the testator would not have said what he has said. It is suggested, however, that for "children" must be read "issue": see Jarman on Wills, 7th ed., vol. iii., p. 1698, where it is stated: "Where land is devised to A absolutely, subject to "a gift over in the event of his dying and leaving no child or "children, 'child or children' is read as meaning 'issue,' "so that the gift over does not take effect if A leaves issue "living at his death." See also Theobald on Wills, 9th ed., p. 589, where it is stated: "In many cases where an estate

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(1) (1854) 1 K. & J. 156.

(2) (1842) 3 Man. & G. 929, 953.

(3) (1854) 3 Ir. Ch. 379.

"in fee is given, followed by a gift over in the event of the "devisee dying without children, the word children has been "construed as synonymous with issue." The passage in Jarman is supported by several authorities. None of them is quite satisfactory: all of them are before the Wills Act, 1837; see *Doe d. Smith* v. *Webber* (1), *Doe d. Simpson* v. *Simpson* (2), *Doe d. Blesard* v. *Simpson.* (3) [He referred to *Richards* v. *Davies* (4), *Bacon* v. *Cosby* (5), and *Parker* v. *Birks.* (6)]

None of these cases is directly in point: all of them are based on old principles of construction that ought not now to be applied.

The will should be construed as it stands, though it cause hardship.

*Wilfrid Gutch* for the London Midland and Scottish Railway Company.

FARWELL J. [after stating the facts:] On behalf of the applicant it is contended that, in a case of this kind, the Court should read the words "leaving no child or children" as meaning "leaving no issue"; and that, if this will be so read, the gift over never took effect and the lady took a fee simple absolute. On the other hand, it is argued that there is no justification for so misconstruing, as it is put, the words in this will. It is said that the words "child or children" have a perfectly definite meaning and cannot be read as meaning "issue," and that, since the beneficiary died without leaving a child or children, her only daughter having predeceased her, the gift over took effect and this money passed accordingly, not to the beneficiary's legal personal representative, but to the class of grandchildren defined in the will.

Mr. Winterbotham, who has put the point extremely fairly and shortly says that there is no authority which would justify my giving to these words "child or children" other than their strict and proper meaning. On the other hand, I have been referred to a passage in Jarman on Wills, and to three cases which, it is said, justify my construing the words in this case as synonymous with "issue." The passage in Jarman is at p. 1698, and is: "Where land is devised to A absolutely, "subject to a gift over in the event of his dying and leaving no "child or children, 'child or children' is read as meaning "'issue,' so that the gift over does not take effect if A leaves "issue living at his death." If that statement in Jarman is to be taken as correct without qualification, it follows that in this case the gift over did not take effect, because the words "child or children" are to be read as meaning "issue," and that event did not happen.

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(1) (1818) 1 B. & Ald. 713.
(2) (1838) 4 Bing. N. C. 333.
(3) 3 Man. & G. 929.
(4) (1862-3) 13 C. B. (N. S.) 69, 861.
(5) (1851) 4 De G. & S. 261.
(6) 1 K. & J. 156.

In my judgment, however, that statement in Jarman is too wide. It is to be noticed that in Theobald on Wills a somewhat similar statement is very much less widely expressed. The learned editor of that book says that there are cases where the words have been so construed or words to that effect, but he does not state that there is a definite rule which binds the Court to read the words in that way. In my judgment it is not correct to say that the words must bear that meaning; but it is, I think, quite true, that there is nothing to prevent the Court putting the wider meaning on those words if the Court comes to the conclusion, from the language of the will, that that was what the testator intended.

The cases to which I have been referred I do not propose to consider in any detail. The first is *Doe d. Smith* v. *Webber*. (1) In that case Lord Ellenborough said in terms that it was possible, in proper cases, to read the words "child or children" as meaning "issue," and although the same result as that at which he arrived in that case could be arrived at in another way, nevertheless it was quite plain that he was not afraid so to construe the words if it became necessary for the purpose of doing what he thought was justice in that case. Another case to which I have been referred is *Doe d. Blesard* v. *Simpson* (2), where a strong Court came to the same conclusion, that is to say, they felt no difficulty in a proper case in

(1) 1 B. & Ald. 713.

(2) 3 Man. & G. 929.

construing the words in their wider meaning, although again it was not absolutely necessary for the purpose of their decision. The other case to which I was referred was *Parker* v. *Birks* (1), a decision of Page Wood V.-C., as he then was, to very much the same effect.

In my judgment the result of those authorities is not to lay down some general rule which the Court must always follow, but to show that the Court is entitled to construe these words "child or children" in a case of this sort as meaning "issue" if, as a matter of construction of the will as a whole, the Court comes to the conclusion that that was what was intended. Mr. Winterbotham has said that those decisions were old decisions, that there have been alterations in the law since they were given, and that at the present day, under modern legislation, the Court ought not to adopt the method of construction which was adopted in those cases in dealing with words of this sort. In my judgment there has been no such change in the law as to prevent me from so reading them if I think it is right to do so. In each case it is a question of the construction of the will as a whole.

When I look at this will, I think that it is reasonably plain that the testator's first and paramount object was to benefit his granddaughter, the beneficiary, and that he did not intend to benefit the other class of persons unless Emma Stoppard Milward died leaving no descendants of hers who might benefit from his bounty. In my judgment the true construction of this will as a whole is that the beneficiary and her descendants were to have the first gift under it, and that the grandchildren of the brother were to come in only in the event of a failure of the beneficiary's descendants. Reading the will in that way I am satisfied that the testator here, when he used the words "child or children," was not using them in the strict meaning of those words, but was using them as meaning "issue," and that to read them strictly would be to defeat what I am satisfied was the true intent of the testator as expressed in his will.

That I am justified in so reading those words in my view is

(1) 1 K. & J. 156.

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1940

ESTATE OF THOMAS MILWARD, *In re.*

clear from the authorities to which I have referred, although they do not compel me to come to that conclusion. Had I come to the contrary conclusion on the construction of the will as a whole, I should not have felt any difficulty from those cases in giving effect to that construction. Putting it quite shortly, in my judgment the result is this: prima facie the words "child or children" mean what they say: but, as a matter of construction of a particular will, the authorities to which I have been referred show that it is open to the Court, if it thinks fit to do so, to give them a wider meaning. In the present case I am satisfied, as a matter of construction, that the words were intended to have the wider meaning. Accordingly, in my view, the applicant in this case is right in asking for payment out on the footing that the beneficiary's absolute interest has not been defeated, because the gift over never took effect.

By consent, the Official Solicitor's costs were ordered to be paid as between solicitor and client out of the fund in Court, the London Midland and Scottish Railway Company agreeing to pay the taxed costs of the applicants.

Solicitors: *Thomas Eggar & Son, for Stevens, Son & Pope, Brighton; The Official Solicitor; Alexander Eddy.*

K. R. A. H.

FARWELL J.

1940

June 5.

## MITFORD COMPANY, LIMITED *v.* COAL COMMISSION.

[1939. M. 2059.]

*Mine—Coal mine—Lease in* 1890 *to one lessee until* 1945*—Lease, in* 1938, *to another lessee, for one hundred years, of property including that comprised in the* 1890 *lease—Operation of Coal Act,* 1938*—Coal Commission, under Act, to acquire rights by paying compensation—" Retained interests," not acquirable by Commission—Interest under a coal-mining lease in coal, sub-demised by a coal-mining lease derived out of that lease, or held as if so sub-demised " by "virtue of any other form of disposition taking effect directly or "indirectly " out of that lease, not a retained interest—*1890 *lease not a " form of disposition taking effect directly or indirectly " out of* 1938 *lease—*1938 *lease a retained interest—Coal Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 52), *s.* 5, *sub-s.* 2, *para.* (*a*).

Sect. 1 of the Coal Act, 1938, provides that there shall be a Coal Commission to exercise and perform the powers and duties set out in the Act, and that it shall be a body corporate with perpetual succession and a common seal, and with power to hold land without licence in mortmain.

By s. 5, sub-s. 1: " Except as provided by subsection (2.) of "this section, interests in coal or a mine of coal that arise under "a coal-mining lease shall be retained interests."

By sub-s. 2: " The following interests, that is to say—(*a*) "interests arising under a coal-mining lease in coal or a mine "of coal which is sub-demised by a coal-mining lease derived out "of that lease, or which is, by virtue of any other form of "disposition taking effect directly or indirectly out of that lease, "held in like manner as if it had been so sub-demised ; . . . . shall "not be retained interests unless the Commission so direct."

In 1890 a lessor granted to a lessee a mining lease for sixty years from March 25, 1885. In 1938 a lessor who, in 1923, had acquired the reversion to the 1890 lease, granted to another lessee a lease for one hundred years from June 24, 1938, of property including that comprised in the 1890 lease.

On July 29, 1938, the Coal Act, 1938, came into operation :—

*Held*, that s. 5, sub-s. 2, para. (*a*), could not be read so as to comprise the 1938 lease. It was impossible to say that the 1890 lease took effect, either directly or indirectly, out of the 1938 lease. The word " indirectly " could not cover something which, in the terms of the Act itself, was outside the language. If there was a casus omissus, it was for Parliament, and not for the Court, to consider whether it should be put right. It followed that the lessee's interest in the coal comprised in the 1938 lease was a retained interest within the meaning of the Act, whether the Commission did or did not so direct.

FARWELL J.

1940

MITFORD CO. v. COAL COMMISSION.

ADJOURNED SUMMONS.

This summons, the first under the Coal Act, 1938, was taken out for the construction of s. 5, sub-s. 2, para. (*a*), of the Act.

On May 9, 1890, Sir Pyers William Mostyn granted to Point of Ayr Collieries, Ld., a mining lease for sixty years from March 25, 1885. In 1923, the Bromborough Estates Company, Ld., acquired the reversion expectant on that lease.

On July 18, 1938, the Bromborough Estates Company, Ld., granted to the Mitford Company, Ld. (hereinafter called "the "plaintiff company"), a lease for one hundred years from June 24, 1938, of property, including that comprised in the 1890 lease. The 1938 lease took effect while the 1890 lease was still in existence, thus being concurrent with the 1890 lease down to 1945, whereupon the plaintiff company would become the only lessees of the property comprised in the 1890 lease. Thus, Point of Ayr Collieries, Ld., were still, at the date of this summons, working the mines and minerals comprised in the 1890 lease, the 1938 lease coming into effective operation in 1945, or at the earlier determination of the 1890 lease.

On July 29, 1938, the Coal Act, 1938, came into operation. The question arose whether the 1938 lease was an interest which the Coal Commission had to acquire under the Act, paying compensation for it, or whether it was excepted from the Act's provisions and was a retained interest within the meaning of the Act, so that the 1938 lease continued to exist until its term expired.

The Act was passed to enable the Commission to acquire the mineral rights in land and the rents and royalties payable therefor. Its duty was to acquire those rights by paying compensation and to make such arrangements as it thought fit for letting the rights to work the mines. It was the Act's policy not to disturb, at any rate in the first instance, lessees holding leases under which minerals were actually being worked. These were to continue until their expiration by effluxion of time: meantime, the rents and royalties payable under them were to be paid to the Commission, which was to apply the money for the general benefit of the industry itself, and of the public. As the leases expired, the Commission had to grant new leases on such terms as it thought proper; among other things, it was not to reduce any rent during the currency of any lease, and, in granting leases, was to observe the rents and conditions customary in the district, and to impose terms which were proper, having regard to the circumstances of the case.

Thus, with regard to the 1938 lease, the Bromborough Estates Company, Ld., as soon as the Act came into operation, became entitled, as the owner in fee simple of the minerals, to compensation calculated as provided by the Act: on payment of that compensation, it ceased to have any interest in the mines. Its rights under the lease became vested in the Commission, but the 1890 lease to Point of Ayr Collieries, Ld., was not affected: it continued, and would do so, in the ordinary course of events, to March 25, 1945, the rents and royalties reserved by it being payable through the plaintiff company to the Commission. From 1938 to 1945, however, by virtue of the 1938 lease, the plaintiff company had a lease concurrent with the 1890 lease, and at the expiration of the 1890 lease, the plaintiff company was prima facie entitled to work the mines on the terms and conditions of the 1938 lease.

Thus the question arose whether there was anything in the Coal Act, 1938, enabling the Commission to acquire the plaintiff company's rights under the 1938 lease, so that, at the expiration in 1945 of the 1890 lease, the Commission would be in a position to make such arrangements as it thought fit to let the minerals comprised in that lease without regard to the plaintiff company's rights under the 1938 lease, subject to compensation being paid to the plaintiff company.

The plaintiff company contended that nothing in the Act could affect its position as lessee, that it was saved by s. 5, sub-s. 2, para. (*a*), of the Act; so that the 1938 lease continued, and would continue, and from 1945 would enable the plaintiff company to work the minerals until the expiration of the lease.

Sect. 3, sub-s. 2, provided that during the period between

January 1, 1939 (the valuation date), and July 1, 1942 (the vesting date), all coal and mines of coal should be held as if all the existing owners thereof had, in respect of all their interests therein other than retained interests, and with full capacity so to do, entered into a contract on the valuation date for the sale thereof to the Commission, at a price to be ascertained by valuation, with provision for completion of the contract on the vesting date. Thus, for the period between January 1, 1939, and July 1, 1942, the coal owners were in the position of vendors with an unpaid purchase price, with a right to be paid it on the due date, and carried on as trustees for the Commission.

By this summons the plaintiff company asked for a declaration that, on the true construction of the Act, its interest in the coal comprised in the 1938 lease was a retained interest within the meaning of s. 5, whether or not the Commission gave directions to that effect.

*Charles Harman K.C.* and *Geoffrey Cross* for the plaintiff company. The question is whether the plaintiff company comes within s. 5, sub-s. 2, para. (*a*) or para. (*b*). Unless it is excepted by para. (*a*), it must come within sub-s. 1.

The 1890 lease is not an " other form of disposition " within para. (*a*). Further, it is contrary to any ordinary meaning of language to say that it " takes effect " out of the 1938 lease: and, again, it is clearly not " held in like manner as if it had "been so sub-demised " ; that is to say, it could not be forfeited on any breach of covenant in the 1938 lease. [They referred to Woodfall's Law of Landlord and Tenant, 24th ed., p. 262, to s. 149 of the Law of Property Act, 1925, dealing with the abolition of interesse termini, and with reversionary leases and leases for lives, and to *In re Moore and Hulm's Contract.* (1)]

On a fair reading of the words, the plaintiff company has a retained interest and is entitled to hold it as such, and asks for the declaration on the summons.

*W. P. Spens K.C.* and *Wilfrid M. Hunt* for the Commission.

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(1) [1912] 2 Ch. 105.

The Commission is a statutory body and its duty is to assist the Court, if it can, by drawing attention to a casus omissus of this kind. The matter is one of very great importance, and the Court is asked to put a construction on these words which will enable retained interests to be subject to s. 5, sub-s. 2.

The words "taking effect directly or indirectly out of that "lease," constitute an extremely untechnical and popular way of referring to the creation of a leasehold reversion. The Court is asked to hold that the plaintiff company's leasehold reversion is not a retained interest, but is an interest which the Commission is entitled to acquire.

The Act's policy, and the Legislature's intention, is to put an end to all interests in mines and minerals, except those of lessees who are actually working them. Thus it must have been intended to apply to the 1938 lease. That lease is longer than the 1890 lease, with which it is concurrent, and if the Commission cannot acquire it now, it will not be able, until a long time has passed, to exercise its rights over the interests comprised in it. It must be conceded, however, that the 1890 lease can hardly be said to come within the words "which is, by virtue of any other form of disposition "taking effect directly or indirectly out of that lease, held in "like manner as if it had been so sub-demised."

*Charles Harman K.C.* and *Geoffrey Cross* in reply. This is legislation of a confiscatory character, seeking to take away something compulsorily. It is admitted that s. 5, sub-s. 1, applies to the plaintiff company, and it is upon the Commission to show that another provision prevents it from so doing. [They referred to s. 25, sub-s. 2, dealing with the reduction of rents by the Commission.]

FARWELL J. [after stating the facts :] The question turns wholly upon the true construction of a very short passage in one section of the Act, and I must turn to the Act now to see what its effect is, so far as material to the question. The preamble is : "An Act to make provision for the acquisition "of the property in all unworked coal and mines of coal and "in certain associated minerals, and of certain associated "property and rights in land, by a Commission with power of "management thereover; for amending the enactments "relating to facilities for the working of minerals; for "empowering the Commission to promote a reduction in the "number of coal-mining undertakings; for continuing Part I. "of the Coal Mines Act, 1930, and for amending the provisions "thereof with respect to committees of investigation; for "enabling land to be acquired compulsorily for the purposes "of the miners welfare committee; and for purposes connected "with the matters aforesaid." Putting it very briefly, the Act was passed in order to constitute the Commission known as the Coal Commission, a body corporate with perpetual succession and a common seal and with power to hold land without licence in mortmain, which should acquire the mineral rights in land and the rents and royalties payable therefor. The Act does not contemplate, in fact it forbids, the getting of coal by the Commission, but its duties are to acquire by paying compensation the rights of the mineral and royalty owners and make such arrangements as it thinks fit for letting the rights to work the mines to people who desire to take them. Further, the policy of the Act appears to be not, in the first instance at any rate, to disturb the lessees who hold leases under which the minerals are actually being worked. The Act apparently intended that those leases should continue until the expiration of the terms in the ordinary way by effluxion of time, and that in the meantime the rents and royalties payable under those leases should be paid to the Commission, who should apply the money for the general benefit of the industry itself and for the benefit of the public generally. As and when the leases expire, the Commission has to grant new leases upon such terms as they think proper (subject to the provisions of the Act) and among other things the Act provides that the Commission shall not reduce any rent during the currency of any lease and that, in granting new leases, the Commission shall observe the rents and conditions which are customary in the district, and impose proper terms having regard to the circumstances of the case.

Putting it quite broadly, the Commission, as and when the leases fall in, has to exercise its discretion, having regard to the terms of the Act, to obtain proper leases of the minerals.

Under those circumstances, the position with regard to this particular mine was this. As soon as the Act came into operation, the Bromborough Estates Company, Ld., who were the owners in fee simple of the minerals in question, ceased to be the owners and became entitled to compensation calculated as provided by the Act, and upon such compensation being paid, will cease to have any interest in the mines. Their rights under the lease became vested in the Commission, but the 1890 lease to Point of Ayr Collieries, Ld., was not affected, that is to say, it continued, and will continue in the ordinary course of events down to Ladyday, 1945, the rents and royalties reserved by that lease being payable, as things are now, through the plaintiff company to the Commission. If the lease to the plaintiff company had never been granted, the position would have been the same, except that the rents and royalties would have been payable direct to the Commission, and no difficulty would have arisen because, under the general provisions of the Act, that lease would have continued to exist down to Ladyday, 1945, and at the end of that period, by the terms of the lease itself, it would determine ; and as from that date it would be the duty of the Commission to let the mines in question on such terms as, subject to the provisions of the Act, it thought proper.

But the position as it is now is this, that, from 1938 to 1945, by virtue of the 1938 lease, the plaintiff company has a lease concurrent with the 1890 lease, and at the expiration of the 1890 lease, that is to say, on Ladyday, 1945, the only lease which will then exist in connection with these properties will be the 1938 lease under which the plaintiff company will prima facie be entitled to work the mines upon the terms and conditions of that lease. That being so, the question arises whether there is anything in this Act which enables the Commission to acquire the rights of the plaintiff company under the 1938 lease so that at the expiration of the 1890 lease, that is to say, on Ladyday, 1945, the Commission will be in a position to make such arrangements as it thinks fit for letting the minerals comprised in that lease without regard to the rights which the plaintiff company have under the 1938 lease, subject, of course, to compensation being paid to the plaintiff company. The plaintiff company say that there is nothing in the Act which affects their position as lessees, that they are saved by the section of the Act to which I will refer in a moment, so that their lease continues and will continue, and from 1945 will entitle them to work the minerals until its expiration some one hundred years hence, they, of course, paying the rents and royalties reserved by that lease, but paying them to the Commission.

As I have said, the whole matter turns upon certain sections of the Coal Act, or rather, I should say, upon a very few words in one section, but I must refer quite shortly to certain of the other sections. Sect. 1, sub-s. 1, provides: "There "shall be a Coal Commission (in this Act called 'the "'Commission') to exercise and perform the powers and "duties set out in this Act." Sub-sect. 2 provides: "The "Commission shall be a body corporate by the name of 'the "'Coal Commission,' with perpetual succession and a common "seal, and with power to hold land without licence in "mortmain." Sect. 2, sub-s. 1, provides "It shall be the "duty of the Commission to exercise their functions as owners "of the fee simple in coal and mines of coal, and of the property "and rights to be acquired by them therewith, in such manner "as they may think best for promoting the interests, efficiency, "and better organization of the coal-mining industry." Sub-sect. 2, provides: "The Commission shall not themselves "engage in the business of coal mining or carry on any "operations for coal-mining purposes, other than searching "and boring for coal, but shall grant leases for those purposes." It is thus quite clear, as I have already said, the whole policy of the Act is not to give the Coal Commission any power to carry on the business of coal mining, but that it is to be put into the place of the owners of the fee simple and of royalties, making such arrangements as it thinks proper for the letting of the rights to work the mines as and when the existing leases come to an end. Sect. 3, sub-s. 1, provides: "The "Commission shall acquire in accordance with the provisions "of this Part of this Act the fee simple in all coal and mines "of coal, together with such property and rights annexed "thereto and such rights to withdraw support as are herein-"after mentioned, subject to such servitudes, restrictive "covenants and other matters adversely affecting any of the "said coal or mines as are hereinafter mentioned, and subject "to the provisions of this Part of this Act with respect to the "retention of interests arising under coal-mining leases and "of certain other interests." Sub-sect. 2 provides: "During "the period between the first day of January nineteen "hundred and thirty-nine (in this Act referred to as the "'valuation date') and the first day of July nineteen hundred "and forty-two (in this Act referred to as the 'vesting date') "all coal and mines of coal shall be held as if all the existing "owners thereof had, in respect of all their interests therein "other than retained interests and with full capacity so to "do, entered into a contract on the valuation date for the "sale thereof to the Commission, at a price to be ascertained "by valuation, with provision for completion of the contract "on the vesting date." So that, for the period between January 1, 1939, and the vesting date, which is July 1, 1942, the coal owners are in the position of vendors with an unpaid purchase price, but with a right to be paid the purchase price on the due date, and until then they carry on as trustees for the Commission. Sub-sect. 3 provides: "On the vesting "date all coal and mines of coal as existing at that date shall "vest in the Commission for a title comprising all interests "then subsisting in any such coal or mine other than retained "interests." Then I think the next section to which I must refer, and which is the material section here, is s. 5, because it deals with those interests which are not to be affected by the Act except to the extent that any rent payable under any lease to the original owners or to the lessors is thenceforth to be payable to the Commission.

Sect. 5, sub-s. 1, is: "Except as provided by sub-section 2 "of this section, interests in coal or a mine of coal that arise "under a coal-mining lease shall be retained interests." By that I understand it to be meant that those rights are to remain untouched by this Act except in so far as the Commission takes the place of the lessor. Then there follows sub-s. 2, which is divided into two parts, and is: "The following "interests, that is to say—(*a*) interests arising under a coal-"mining lease in coal or a mine of coal which is sub-demised "by a coal-mining lease derived out of that lease, or which "is, by virtue of any other form of disposition taking effect "directly or indirectly out of that lease, held in like manner "as if it had been so sub-demised; and (*b*) interests arising "under a coal-mining lease where neither the lessee nor any "person claiming under him is a person carrying on the "business of coal-mining and having a substantial beneficial "interest in the exercise of the rights conferred by the lease; "shall not be retained interests unless the Commission so "direct." So that the position is that interests in coal or a mine of coal which arise under a coal-mining lease are retained interests, but if an interest which otherwise would be a retained interest comes within sub-s. 2, para. (*a*) or para. (*b*), it never does become a retained interest, but is an interest which the Commission must acquire upon payment of compensation. It is, as it were, an exception out of what would otherwise be a retained interest.

To get rid of the provision in para. (*b*) at once, the position is this: the question whether or not the particular interests under para. (*b*) are within the exception of what would otherwise be a retained interest, is a question of fact; it is not a question of law. It is a question of fact to be determined on proper evidence. The evidence in this case is, in my judgment, wholly one way. It proves that the plaintiff company are the lessees of a mining lease and are actually working the coal comprised in that lease. That is not seriously disputed by the Commission, and having regard to that evidence, it appears to me it necessarily follows that para. (*b*) has no application to this case. The plaintiff company do not come within the exception in para. (*b*) and unless they come within para. (*a*) their interests are retained interests within the meaning of the Act.

Now I must turn to para. (*a*). The first part of it is: "interests arising under a coal-mining lease in coal or a mine "of coal which is sub-demised by a coal-mining lease derived "out of that lease, . . . ." In the present case it is impossible to suggest, and I do not think it has been suggested, that the lease in this case, the lease of the plaintiff company, comes within that part of the sub-section. Quite plainly it does not. Therefore I need not consider those words any further. It is the following words which have given rise to the question: ". . . . or which is, by virtue of any other form of disposition "taking effect directly or indirectly out of that lease, held in like "manner as if it had been so sub-demised; . . . ." Mr. Spens, who appears for the Commission, has said, with great frankness, that, to any lawyer reading those words, it would be obvious that the particular lease in this case was not within the language so used. I think Mr. Hunt did not accept that, and he has suggested that to any person, including myself, if properly read those words include such a lease as I am dealing with in the present case. Mr. Spens has put his case, as I understand it (I hope I am not doing him an injustice) on this ground. He says that the policy of the Act and the intention of the Legislature as shown in the Act was to get rid of all interests in mines and minerals other than the interests of persons who, under leases, were actually working the mines and minerals at the date when the Act came into operation; and that, taking that as the general intention of the Act, it must have been intended to include such a lease as the present lease (a concurrent lease which is longer than the original lease) because otherwise the right which the Commission will have, or has, under the Act to grant leases on such terms as they think fit, will be postponed for a very long period. Further, he says that, unless the words do apply to an interest of this sort, there is nothing to which the words can apply at all, and that the Court is bound to give effect to all the language of the Act as a whole.

I think that, however much force there may be in that argument, the real answer is that the Court is not entitled to misconstrue the language used in the Act in order to give effect to what, it has been suggested, is the real policy of the Act. In my judgment, when one reads these words, it is perfectly apparent that they cannot be read so as to comprise this particular lease. Mr. Hunt produced a very ingenious argument which had the merit of being, at any rate to me, extremely attractive ; but I am convinced that it is fallacious. It is impossible to say that the 1890 lease takes effect either directly or indirectly out of the 1938 lease. Mr. Hunt has pinned his faith to the use of the word "indirectly." He says that that is a word of doubtful meaning and is wide enough to sweep up any interest which is not otherwise caught by the actual language of the Act. I cannot believe that the word "indirectly" can cover something which, in the terms of the Act itself, is outside the language. I have not to determine whether there are other interests which are caught by the words of the sub-section. I am by no means prepared to say there are no such interests : but, however that may be, I am satisfied that it is impossible to read these words so as to comprise within the scope of this sub-section the lease of the plaintiff company. Mr. Spens has said that that may be so from the point of view of a person who has any acquaintance with conveyancing and legal terms, but that, in popular parlance, it is possible to read these words so widely as to include something which, on their proper construction, is not included. What the man in the street might think these words convey to him, I have not the least idea, but I am quite satisfied that the language itself, which I must construe, is not wide enough to include this particular lease. If I were to read the words so as to give effect to the argument of the Commission I should, in my judgment, be going outside my proper function ; I should not be construing the Act, but should be attempting to legislate. If there is in fact a casus omissus here, it is for Parliament, and not for me, to consider whether it should be put right. My only duty is to construe the Act, and I cannot construe it except in the sense in which the plaintiffs ask me to construe it.

It follows that in my judgment this interest is a retained interest within the meaning of the Act and I must make a declaration that, on the true construction of the Act, the plaintiff company's interest in the coal comprised in the 1938 lease is a retained interest within the meaning of s. 5 of the Act. The plaintiff company must have the costs of the summons, as between party and party.

Solicitors: *Herbert Reeves & Co.; B. S. Jaquet; Gregory, Rowcliffe & Co., for Peace & Ellis, Wigan.*

K. R. A. H.

## BANKS v. RIPLEY.

[1939. B. 4687.]

MORTON J.

1940

May 2, 3, 6.

*Rectification—Settlement—Evidence of intention—No evidence apart from document itself—Jurisdiction of Court.*

By a marriage settlement executed in 1873 and containing no recitals, S. C., the father of the wife, E. C., conveyed certain freehold hereditaments to W. K. and his heirs upon trust to pay the income to E. C. during her life and upon her decease to stand possessed of them in trust for all or such one or more of the children of the marriage in such shares and in such manner as she should appoint and in default of such appointment "for all the children "of the said intended marriage who being a son or sons shall attain "the age of twenty-one years or being a daughter or daughters "attain that age or marry in equal shares and if there be only "one such child the whole to be in trust for that one child but "in case there shall not be any children or child of the said "intended marriage who being a son shall attain the age of twenty-"one years or being a daughter shall attain that age or marry "then the said W. K. shall hold the said hereditaments to the "use of the right heirs of the said S. C." It was provided that, after the death of E. C., W. K. might "apply all or a competent "part of the income from each such child's share of the said "hereditaments towards his or her maintenance and education "during his or her minority." E. C. died in 1901, the only child of the marriage being A. B. It having been discovered that the terms of the settlement only conferred a life interest on her, she commenced an action for rectification in 1939, contending that words should be inserted so that the settlement should read ". . . . in "trust for all the children of the said intended marriage who being "a son or sons shall attain the age of twenty-one years or being a "daughter or daughters attain that age or marry and their heirs "in equal shares and if there be only one such child the whole "to be in trust for that one child and his or her heirs":—

*Held*, (1.) that the Court had jurisdiction to rectify the document on evidence afforded simply by a perusal of it, there being no other admissible evidence available;

*Uvedale* v. *Halfpenny* (1723) 2 P. Wms. 151 followed.

(2.) that the document afforded sufficient evidence that the intention of the parties to the settlement was to give the fee simple to the children of the marriage or to the only child, if there were only one, who attained the age of twenty-one years;

(3.) that, accordingly, the settlement should be rectified.

WITNESS ACTION.

In contemplation of a marriage between William Lewins and Eliza Culff (hereinafter called "the wife"), a settlement was executed on June 18, 1873, the settlor being Samuel Culff, the father of the wife, the trustee being one William King, and the subject-matter being certain freehold land and buildings in Middlesex. The deed, which contained no recitals, witnessed that "in contemplation of a marriage between the said Eliza "Culff and the said William Lewins, the said Samuel Culff "doth grant and convey unto the said William King and his "heirs all the freehold hereditaments described in the Schedule "hereto with their actual and reputed appurtenances and all "the estate and interest of the said Samuel Culff therein to "hold the said hereditaments and premises unto the said "William King and his heirs to the uses upon the trusts and "with and subject to the powers and provisions hereinafter "declared and contained concerning the same (that is to say) "to the use of the said Samuel Culff and his heirs until the "solemnization of the said intended marriage and from and "after the solemnization thereof to the use of the said William "King and his heirs and assigns upon trust to receive and pay "the income therefrom unto the said Eliza Culff (whose receipt "alone shall be sufficient discharge for the same) during her "life for her separate and inalienable use during any coverture "and upon the decease of the said Eliza Culff the said William "King shall stand possessed of the said hereditaments in trust "for all or such one or more of the children of the said intended "marriage in such shares if more than one and in such manner "as the said Eliza Culff shall by any deed or deeds with or "without power of revocation and new appointment or by her "will or any codicil thereto and whether she shall be under "coverture or not appoint and in default of such appointment "and so far as any such appointment shall not extend in trust "for all the children of the said intended marriage who being "a son or sons shall attain the age of twenty-one years or "being a daughter or daughters attain that age or marry "in equal shares and if there be only one such child the whole "to be in trust for that one child but in case there shall not be "any children or child of the said intended marriage who "being a son shall live to attain the age of twenty-one years "or being a daughter shall attain that age or marry then the "said William King shall hold the said hereditaments to the "use of the right heirs of the said Samuel Culff and it is hereby "declared that after the decease of the said Eliza Culff the said "William King or other the trustees or trustee for the time being "of these presents shall be possessed of the said hereditaments "upon trust in his or their discretion to repair and insure the "buildings thereon (to two-thirds of the full value thereof) "and to take surrenders from adjust accounts with and make "allowances to tenants and generally to manage the said "hereditaments and after the decease of the said Eliza Culff "to apply all or a competent part of the income from each such "child's share of the said hereditaments towards his or her "maintenance and education during his or her minority and "to invest and accumulate the surplus (if any) thereof and the "income therefrom upon Government or real securities in "England or Wales (but not Ireland) for the benefit of the "person or persons who would be entitled thereto if the same "were money arising from a sale of the said hereditaments with "power to apply such accumulations towards the maintenance "or education of the person or persons entitled thereto during "his her or their minority or minorities."

The marriage was solemnized, and there was only one child, who attained the age of twenty-one years, and married, the plaintiff, Annie Banks. The wife, who made no appointment under the settlement, died on August 15, 1901, and the plaintiff became entitled in possession to the settled land. It was subsequently discovered by the plaintiff's solicitors that the settlement, on its true construction, only conferred a life interest on her, and on November 27, 1939, she commenced an action for rectification of it. It was contended that words should be inserted so that the settlement should read ". . . . "in trust for all the children of the said intended marriage who "being a son or sons shall attain the age of twenty-one years "or being a daughter or daughters attain that age or marry "and their heirs in equal shares and if there be only one such "child the whole to be in trust for that one child and his or her "heirs." The defendants were the persons who would be interested in the settled property if there were a resulting trust to the settlor on the death of the plaintiff. There was no evidence, apart from the document itself, that the intention of the parties to it was that the fee simple should pass to the children or child of the marriage.

*R. H. Hodge* for the plaintiff. There is clear jurisdiction to rectify this document on evidence afforded simply by a perusal of it, there being no other admissible evidence available: *Uvedale* v. *Halfpenny* (1); *Fitzgerald* v. *Fitzgerald* (2); *In re Davis's Estate.* (3) This settlement on the face of it affords sufficient evidence that the intention of the parties was that the fee simple should pass to the children of the marriage. There are several indications in it of such an intention. In the first place this is a marriage settlement. Next, there are the terms of the gift over in default of issue "to the use of the "right heirs of the said Samuel Culff." Next there is the reference to "each such child's share of the said hereditaments." Next, there is the reference to accumulation of surplus income "for the benefit of the person or persons who would be entitled "thereto if the same were money arising from a sale of the said "hereditaments with power to apply such accumulations "towards the maintenance and education of the person or "persons entitled thereto during his her or their minority or "minorities." [He referred to *In re Bird's Trusts* (4); *In re Whiston's Settlement. Lovatt* v. *Williamson* (5); *In re Tringham's Trusts. Tringham* v. *Greenhill* (6); *In re Bostock's Settlement. Norrish* v. *Bostock* (7); *In re Oliver's Settlement. Evered* v. *Leigh.* (8)]

*J. A. Wolfe* (for *E. Milner Holland*, on war service) for the adult defendants. The only English reported case in which the jurisdiction contended for by the plaintiff has been exercised is *Uvedale* v. *Halfpenny* (1), over two centuries ago. In that case there were no recitals to show that a mistake had been made and no extrinsic evidence, so that the mistake was

(1) (1723) 2 P. Wms. 151.
(2) [1902] 1 Ir. R. 477.
(3) [1912] 1 Ir. R. 516.
(4) (1876) 3 Ch. D. 214.
(5) [1894] 1 Ch. 661.
(6) [1904] 2 Ch. 487.
(7) [1921] 2 Ch. 469.
(8) [1905] 1 Ch. 191.

deduced from the operative part of the document. Though there is jurisdiction to order rectification in such a case, it must only be exercised on the strongest evidence: *Fowler* v. *Fowler*. (1) In this case the evidence is not sufficient to establish a mistake. In *Fitzgerald* v. *Fitzgerald* (2) the presence of the words "in tail" was extremely compelling. In the case of *In re Davis's Estate* (3) there were certain recitals which assisted the Court in reaching its conclusion.

*L. R. Norris* (for *B. S. Tatham*, on war service) for the infant defendants. Though in the case of *In re Bostock's Settlement* (4) the members of the Court of Appeal found that there was a sufficient expression of intention to show that the parties meant the children of the marriage to take absolutely, that view was based on the whole instrument. Each case turns on its own particular facts. This case falls short of what is necessary for rectification.

MORTON J. [having stated the facts:] In those circumstances two questions arise for my decision. The first is whether there is jurisdiction to rectify the settlement on the evidence afforded simply by a perusal of the document itself, there being, as I think, no other relevant or admissible evidence available. The second question is whether, if there is such a jurisdiction, this document affords in itself sufficient evidence of the intention, on the part of the parties to it, that the fee simple of these houses should pass to the children or child of the marriage. Now, as to the first question, Mr. Hodge has referred me to the case of *Uvedale* v. *Halfpenny* (5), and also to two Irish cases, *Fitzgerald* v. *Fitzgerald* (2) and *In re Davis's Estate*. (3) He also referred me to the case of *In re Bird's Trusts* (6), but he pointed out very rightly that it does appear from the report of that case that affidavit evidence showing the intention of the parties was before the Court, although unfortunately, beyond the brief statement that "there "were two affidavits in support of the petition showing the

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(1) (1859) 4 De G. & J. 250, 264.
(2) [1902] 1 Ir. R. 477.
(3) [1912] 1 Ir. R. 516.
(4) [1921] 2 Ch. 469.
(5) 2 P. Wms. 151.
(6) 3 Ch. D. 214, 216.

"intention of the parties," the nature of the evidence is not specified.

Counsel for the defendants intimated at an early stage in the argument that having regard to the cases of *Uvedale* v. *Halfpenny* (1), *Fitzgerald* v. *Fitzgerald* (2) and *In re Davis's Estate* (3) they could not contend that there was no jurisdiction in the Court to rectify a document on the evidence afforded by a perusal of the document itself, but they submitted as to the second question that the evidence afforded by the settlement in this case was not sufficient to enable the Court to ascertain either that there had been a mistake or the precise nature of the mistake, if there were one. They referred me to the well known passage in the judgment of Lord Chelmsford L.C. in *Fowler* v. *Fowler* (4), which is in the following terms: "The "power which the Court possesses of reforming written "agreements where there has been an omission or insertion of "stipulations contrary to the intention of the parties and under "a mutual mistake is one which has been frequently and most "usefully exercised. But it is also one which should be used "with extreme care and caution. To substitute a new agree-"ment for one which the parties have deliberately subscribed "ought only to be permitted upon evidence of a different "intention of the clearest and most satisfactory description. "Lord Thurlow's language is very strong on this subject; he "says, 'the evidence which goes to prove that the words "'taken down in writing were contrary to the concurrent "'intention of all parties must be strong, irrefragable evidence': "*Lady Shelburne* v. *Lord Inchiquin*. (5) And this expression "of Lord Thurlow is mentioned by Lord Eldon in the *Marquis* "*of Townshend* v. *Stangroom* (6), without disapprobation. If, "however, Lord Thurlow used the word 'irrefragable' in its "ordinary meaning, to describe evidence which cannot be "refuted or overthrown, his language would require some "qualification; but it is probable that he only meant that the "mistake must be proved by something more than the highest

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(1) 2 P. Wms. 151.

(2) [1902] 1 Ir. R. 477.

(3) [1912] 1 Ir. R. 516.

(4) 4 De G. & J. 250, 264.

(5) (1781) 1 Bro. C. C. 338, 341.

(6) (1801) 6 Ves. 328, 334.

"degree of probability, and that it must be such as to leave no "fair and reasonable doubt upon the mind that the deed does "not embody the final intention of the parties. It is clear that "a person who seeks to rectify a deed upon the ground of "mistake must be required to establish, in the clearest and "most satisfactory manner, that the alleged intention to "which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its "execution, and also must be able to shew exactly and precisely "the form to which the deed ought to be brought. For there "is a material difference between setting aside an instrument "and rectifying it on the ground of mistake. In the latter "case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a "new written agreement."

Now, let me turn back to the settlement of June 18, 1873, and consider first of all, apart from authorities as to the effect of documents in some respects similar to this one, whether on a perusal of it there is left in my mind any fair or reasonable doubt that it does not embody the final intention of the parties. I should perhaps deal with the indications of intention in the order in which they appear in the settlement and not in what I consider to be the order of their importance. In the first place it is to be observed that there is a clear gift of an equitable life interest to Eliza Culff. This shows that the settlor was well aware how a life interest ought to be given and that when he wished to give one, he could and did do so in plain terms. In the second place I observe that the power of appointment which is given to Eliza Culff is clearly wide enough to cover an appointment of the fee simple to a child or children of the intended marriage. In the third place there are the terms of the gift in default of appointment, which, as a matter of construction, confers only a life interest. This gift cannot confer more than a life interest because of certain rules by which the Court is bound. These rules, as has been plainly pointed out in certain cases, do not depend upon intention. Next I come to what, to my mind, is the strongest indication of intention in the whole document: "But in case there shall not be any "children or child of the said intended marriage who being a "son shall live to attain the age of twenty-one years or being a "daughter who shall attain that age or marry then the said "William King shall hold the said hereditaments to the use "of the right heirs of the said Samuel Culff." That seems to me to be the plainest possible indication that nothing was intended to go over to the right heirs of Samuel Culff if there was a child of the marriage who being a son attained twenty-one years or being a daughter attained that age or married. I cannot conceive that, if it had been the intention of the parties to give a life interest only, the gift over would have been worded in that way.

I now pass to another indication of intention. The document proceeds: "And it is hereby declared that after the decease "of the said Eliza Culff the said William King or other the "trustees or trustee for the time being of these presents shall "be possessed of the said hereditaments upon trust in his or "their discretion to repair and insure the buildings thereon "(to two thirds of the full value thereof) and to take surrenders "from adjust accounts with and make allowances to tenants "and generally to manage the said hereditaments and after "the decease of the said Eliza Culff to apply all or a competent "part of the income from each child's share of the said heredita-"ments towards his or her maintenance and education during "his or her minority." It seems to me that the words "each "child's share of the said hereditaments" afford yet another indication of the intention that the estate was to be absolute and not for life only. The document then proceeds: "And to "invest and accumulate the surplus (if any) thereof and the "income therefrom upon Government or real securities in "England or Wales (but not in Ireland) for the benefit of the "person or persons who would be entitled thereto if the same "were money arising from a sale of the said hereditaments with "power to apply such accumulations towards the maintenance "or education of the person or persons entitled thereto during "his her or their minority or minorities." Mr. Hodge relied upon that passage also as an indication of intention, but I cannot myself attach very much weight to it although I think it does assist him to some extent. Apart from the indications contained in the language of the document, it must not be left out of account that it was a marriage settlement; that is regarded in many cases as an indication of intention to make provision for the issue of the marriage and also to give the property out and out to them if they came into existence.

Now, dealing with the matter apart from authority, and having read that settlement, I am left with no doubt in my mind that the intention of the parties was to give the fee simple to the children or child of the marriage, who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry. The cumulative effect of the indications of such an intention is extremely strong, but the point which makes me feel completely satisfied of it is the form of the gift over.

Having formed that view upon a perusal of the document itself, I need not deal in any great detail with the judgments in the various cases to which I have been referred, but I think it is right that I should mention these cases for the purpose of seeing whether there is anything in them which tends either to displace the view I have formed or to confirm it. The earliest case is that of *Uvedale* v. *Halfpenny* (1), in which a document was rectified. No oral evidence appears to have been given as to the intention of the parties, and it does not appear from the report that there was any recital. There were certainly strong reasons for concluding that there was a mistake and these were expressed by Jekyll M.R. as follows (1): "I would "not destroy the settlement, but set it right, according to the "intention and agreement of the parties; and by the declaration "of the trust of the term, the intention and agreement of the "parties manifestly appears to be, that the land should be "charged with the payment of portions for the younger sons "and daughters at certain ages, viz. for the sons at twenty-one, "and for the daughters at twenty-one or marriage, and maintenance to begin from the death of the husband; and this "appearing, I do not regard the placing of the term, but will

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(1) 2 P. Wms. 151.

"help the mistake, which would otherwise prevent the agreement of the parties from taking effect." The result was that the Court altered the order of the limitations contained in that settlement in order to place the limitation of a term to secure portions before the limitation to the first and other sons in tail male; in the settlement the last mentioned limitation preceded the portions term.

I shall deal with the other cases in the order in which they were cited to me. *Fitzgerald* v. *Fitzgerald* (1) was also a case in which rectification was granted on the evidence afforded by the document itself, but it is true to say, as was pointed out by counsel for the defendants, that the point which seems to have influenced the Court of Appeal in Ireland most was the fact that there the words "in tail" appeared. There were other indications of intention in the document itself, including a gift over in default of issue of the marriage, but there is no doubt that the Court attached the greatest importance to the words "in tail" as an indication that the parties were intending to confer an estate tail and not an estate for life.

*In re Davis's Estate* (2), to which I have already referred, was a case in which the ultimate gift in favour of the issue female of the marriage was in terms which were only sufficient to give them a life interest, and the Court rectified the settlement so as to give them an estate in fee simple. It is true, as has been pointed out by counsel for the defendants, that there were certain recitals in that case which assisted the Court in coming to the conclusion that a mistake had been made, but there were other indications upon which the Court relied.

The decision of Malins V.-C. in the case of *In re Bird's Trusts* (3) is not, I think, of much assistance on the present question, because there was, as I have said, affidavit evidence showing the intention of the parties; one affidavit was made by a party to the deed and it is not quite clear how far the Vice-Chancellor was relying only upon the document itself and how far he was assisted by that evidence.

I now come to a line of cases which were cited by Mr. Hodge primarily for the purpose of showing the history of the views of the Court upon the question of construction arising in such a case as that of the present settlement. They are of importance because they contain some striking expressions of the view of the Court as to how far the document itself reveals the intention of the parties and the mistake made in its preparation. The first of them is *In re Whiston's Settlement. Lovatt* v. *Williamson.* (1) The headnote states the effect of the decision briefly but accurately as follows: "An "equitable limitation, by way of trust executed, now has the "same construction as a legal limitation." In that case according to the statement of facts the ultimate gift in a post-nuptial settlement in favour of the child or children of the settlor was "in trust for such child or children of the settlor "as 'being a son or sons shall attain the age of twenty-one "'years, or being a daughter or daughters shall attain the "'age of twenty-one years, or be married under that age, which "'shall first happen, the same to be, if only one such child, "'paid, assigned or transferred unto him or her solely, or if "'two or more such entitled children, then to be paid, assigned "'or transferred in equal shares, as tenants in common, and the "'share of each such son is to be paid, assigned or transferred "'at his age of twenty-one years, and of each daughter at her "'age of twenty-one years or day of marriage, which shall "'first happen, or so soon thereafter as the decease of the "'survivor of them,' the said settlor and his wife, 'will "'permit.' The settlement contained an advancement clause, "empowering the trustees to raise any part not exceeding one "moiety 'of the share or portion or respective shares or "'portions of which any child or children shall be actually "'or presumptively entitled of and in the trust estate' and "'so that the moneys to be raised and applied for any such "'child or children respectively be considered as part of his "'or their share or portion, shares or portions, under these "'presents.'" Chitty J. commenced his judgment as follows (2): "The question I have to decide is, what interest "these children took under the settlement of August, 1845.

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(1) [1902] 1 Ir. R. 477.
(2) [1912] 1 Ir. R. 516.
(3) 3 Ch. D. 214.

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(1) [1894] 1 Ch. 661.

(2) Ibid. 663.

"It is admitted that the real estate settled by George Whiston "was only an equity of redemption, and that the legal estate "therefore was, and still is, outstanding. The settlement "contains a series of formal limitations in favour of the settlor's "wife, the settlor, and their children ; but when you come to "read the actual words of limitation to the children, the words "' heirs ' or ' fee simple ' are not used. If the case had to be "decided according to the doctrine of legal limitations, it is "plain that these children would only take life interests ; "but the limitations are, as a fact, only of an equitable interest, "and on this point some of the older text-writers, such as "Cruise and Hayes, seem to have been of opinion that equity "regarded the intention of the settlor in these cases, and did "not follow the law." He then proceeded to discuss certain earlier cases and the opinions of the older text-book writers, and he held that the children took a life interest only under the settlement. That case was considered by Joyce J. in the case of *In re Tringham's Trusts. Tringham* v. *Greenhill* (1), and the learned judge held, according to the headnote, that "A limitation, in a deed, of a trust of real estate for A., without any "words of inheritance, may confer the equitable fee upon him "where the intention to do so is expressed or sufficiently shewn "upon the face of the instrument." Having considered the settlement before him, Joyce J. held "that there being upon "the face of the instrument sufficient indication of intention "on the part of the settlor that absolute interests should be "given, the three children, notwithstanding the absence of any "limitation to their ' heirs,' were entitled as tenants in common "in equal shares for equitable estates in customary fee simple." In his judgment he said this (1) : "Having regard to the terms "of the surrender and trust deed, I think that the intention "to make a complete settlement of the property purchased "is tolerably plain, and if there could otherwise have been any "doubt upon the subject this would in my opinion be entirely "removed by the form of the gift over ' in default of issue ' "which shows that the children, if any, under the previous "gift were to take absolute interests or estates in fee." The words of limitation to the children were these: "on the decease "of the survivor of them the said Mary Ann Tringham"—that is the wife—"and any husband she may marry as aforesaid "then in trust for all the children of such marriage equally "to be divided between them as tenants in common, and in "default of issue of such marriage then to such uses as she the "said Mary Ann Tringham shall declare in and by her last "will and testament in writing, with remainder to the right "heirs of her the said Mary Ann Tringham." Now it is helpful to note that Joyce J., in considering the gift over, which was in substance to the same effect as the gift over which I have to consider, took the view that if there had been any doubt whether it was intended to make a complete settlement of the property, it would have been entirely removed by the terms of the gift over, which showed that the children were under the previous gift to have absolute interests. He then considered the decision of Chitty J. in the case of *In re Whiston's Settlement* (1) and distinguished it, observing that (2) "Chitty J. "examined the instrument with the result that he found no "expression or sufficient indication of intention on the part "of the author of the instrument that absolute interests should "be given." It is of interest to note that Joyce J. used these words: "I may add that if I could not have seen my way thus "to determine as a matter of construction of the deed, then, "having regard to *In re Bird's Trusts* (3) and *Fitzgerald* v. "*Fitzgerald* (4), I should have had most seriously to consider "whether I ought not to rectify the declaration of trust in this "case by the insertion of the word 'heirs' where it is supposed "to be required." The decision of Joyce J. in the case of *In re Tringham's Trusts* (2) was afterwards disapproved by the Court of Appeal in the case of *In re Bostock's Settlement. Norrish* v. *Bostock* (5), to which I shall shortly refer, but I find his observations on the intention manifested by the document of assistance in the present case.

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(1) [1904] 2 Ch. 487, 490.

Next I shall refer to the case of *In re Oliver's Settlement.*

(1) [1894] 1 Ch. 661.
(2) [1904] 2 Ch. 487, 494.
(3) 3 Ch. D. 214.
(4) [1902] 1 Ir. R. 477.
(5) [1921] 2 Ch. 469.

*Evered* v. *Leigh* (1), which was a decision of Farwell J. In that case in the marriage settlement there was again an ultimate gift in favour of the children of the marriage without words of limitation sufficient to make it a gift in fee simple. The settlement contained a hotchpot clause, an advancement clause and a gift over in the following terms: "If there "shall be no child of the intended marriage who shall "attain a vested interest under the trusts aforesaid, the "trustee shall stand possessed of the lands settled by John "Oliver in trust for such persons as he shall appoint, and in "default of appointment for his right heirs." Farwell J., in a brief judgment, said this as to the construction of the gift over in default of children (2): "The law upon this point has "been very recently stated by Joyce J. in *In re Tringham's Trusts* (3), and I need not therefore state it again." His Lordship read the first paragraph of the headnote in that case and proceeded: "I adopt that as a correct statement of the "law, and all I have to consider is whether in the case before "me there is sufficient to shew an intention that the children "should take the fee. I think there is. The trustees are "directed to convey the trust estate to the children, and that "naturally means all the estate they had. The power of "advancement seems almost conclusive, for it is hardly "conceivable that the parties intended an advance to be made "of half the value of a life estate in remainder. But I think "that the gift over, if there should be no child who should attain "a vested interest, is absolutely conclusive." That again I think is of assistance in the present case.

I come lastly to *In re Bostock's Settlement*. (4) I quote the headnote which I think accurately and sufficiently states the facts for the purpose of my decision: "By a settlement made "upon his second marriage the husband conveyed freeholds "(subject to existing mortgages thereon) to trustees in fee "simple to the use of the wife and himself for successive life "interests and after his decease 'in trust for the child or "'children' of the husband 'now born or hereafter to be

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(1) [1905] 1 Ch. 191.

(2) Ibid. 194.

(3) [1904] 2 Ch. 487.

(4) [1921] 2 Ch. 469.

"' born who shall attain the age of twenty-one years and if "' more than one in equal shares as tenants in common and if "' there shall be no such child then in trust for the right "' heirs' of the husband. The husband then assigned lease- "holds, chattels and a policy of insurance upon similar trusts "which so far as the children were concerned were expressed "in identical terms. The settlement also contained a proviso "enabling the trustees to ' mortgage or charge the said premises "' hereinbefore expressed to be hereby conveyed and assigned "' with any sum or sums not exceeding together one-half of the "' expectant share of any child' and to ' apply the same for his "' or her benefit or advancement.' There was also a hotchpot "clause to the effect that no child of his first marriage was "' to take any part of the trust premises herein comprised "' without bringing into hotchpot all sums of money and other "' benefits which he or she may receive' under an earlier "settlement: Held, that the limitations in trust having been "perfected and declared by the settlor, they must have the "same construction as in the case of legal estates executed, "and therefore that in the absence of words of limitation, the "children took life estates only in the freeholds. Held, also, "that if it had been necessary to decide the point, there were "sufficient indications in the settlement of an intention that the "children should take absolute interests in the freeholds. "Principle applied by Chitty J. in *In re Whiston's Settlement* (1) "followed. *In re Tringham's Trusts* (2) overruled. Decision "of Eve J. (3) affirmed, but on different grounds." As was set out in the statement of facts, "Eve J. held that there was no "sufficient indication in the settlement of an intention that "the children should take absolute interest in the freeholds and "accordingly that in the absence of words of limitation they took "life interests only." Now the effect of the decision in *In re Bostock's Settlement* (4) was this: it set at rest any difference of opinion there was between the learned judges who decided *In re Tringham's Trusts* (2) and *In re Oliver's Settlement* (5),

(1) [1894] 1 Ch. 661.
(2) [1904] 2 Ch. 487.
(3) [1921] 1 Ch. 432.
(4) [1921] 2 Ch. 469.
(5) [1905] 1 Ch. 191.

on the one hand, and Chitty J., who decided *In re Whiston's Settlement* (1), on the other hand. In view of *In re Bostock's Settlement* (2) if this had been a question as to the effect of the words actually contained in the document it would have been impossible to hold, as a matter of construction, that anything more than a life interest was given to the plaintiff in the present case. I do not think there was any distinction on that point between *In re Bostock's Settlement* (2) and the present case, but in the course of their judgments all the three members of the Court of Appeal indicated that in their view there was a sufficient expression of intention to make it plain that the parties intended the children of the marriage to take absolutely. Lord Sterndale M.R. said this (3): "I therefore arrive at the "same conclusion as Eve J. but on different grounds. The "learned judge did not decide this point, but gave judgment "for the respondents on the ground that no sufficient expression "of intention to give the children more than a life estate could "be found in the settlement. If it were necessary to decide "this point, I should not agree with the learned judge, and I "should think there was such a sufficient expression of "intention." Then again Warrington L.J. said (4): "The "point on which the learned judge proceeded depends on the "construction of the particular instrument, and I am bound to "say that if I felt myself at liberty to act on my view of the "construction of the deed without reference to the "technical rules governing its effect, I should come to the opposite "conclusion to that of the learned judge." Younger L.J. expressed himself very strongly to the like effect in his judgment. I need not read the whole of the passage, but he said this (5): "A "close study of the deed satisfies me that it embodies from first "to last no other intention than that the children of the settlor "on attaining twenty-one are to take an absolute interest no "less in the freeholds than in the other property settled, and I "cannot bring myself to doubt that the omission from the "limitation of the freeholds to the children of the words

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(1) [1894] 1 Ch. 661.
(2) [1921] 2 Ch. 469.
(3) Ibid. 481.
(4) Ibid. 483.
(5) Ibid. 487.

"adapted indubitably to produce that result is an omission "of the draftsman attributable either to accident or to "ignorance." Later he said (1): "I find it"—that is the intention to give absolute interests—"apparent in the provisions as to hotchpot, and, like Farwell J. in *In re Oliver's* "*Settlement* (2), I find the provision as to advancement almost "conclusive and the gift over absolutely conclusive on the "subject."

The result is that a thorough consideration of all the authorities to which I have referred fortifies me in the view which I formed on a perusal of the document itself, that the intention of the parties is plainly shown by the document. To use the expression of Younger L.J. the deed embodies from first to last an intention that the children of the marriage being males on attaining twenty-one years or being females on attaining that age or marrying, are to take an absolute interest. Like Younger L.J. in the case of *In re Bostock's Settlement* (3), I cannot bring myself to doubt that the omission from the limitation of the freeholds of the words which would produce that result is an omission of the draftsman attributable either to accident or ignorance. I should add, however, that Younger L.J. went on to say this (4): "But there is one thing I do not find in the settlement. I "find no recital which would justify the Court in saying that "its operative provisions are incomplete or imperfect. I find "no basis for reforming or rectifying it. Nor is there anything "executory in the frame of the document. No further or "additional instrument is required to give it complete effect. "In these circumstances all that the Court can do is to construe "it according to the import of the words used." I cannot read that observation of the learned Lord Justice as meaning that if an action for rectification were brought and if the Court were satisfied on the evidence afforded by the document that a mistake had been made, and that the document did not embody the true intention of the parties, the Court would be precluded from rectifying the document. I do not think the

(1) [1921] 2 Ch. 469, 488.
(2) [1905] 1 Ch. 191.
(3) [1921] 2 Ch. 469.
(4) Ibid. 488.

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observation can possibly have that meaning. As I have said, there is authority for rectifying a document in those circumstances, and indeed it was conceded by counsel for the defendants that the jurisdiction exists.

Mr. Wolfe informed me that there has been no reported case in England, since the case of *Uvedale* v. *Halfpenny* (1), in which rectification was ordered where the only evidence relied upon was the document itself, and where the document did not contain any recital which made it manifest that a mistake had been made. That is a very interesting and remarkable circumstance, but it may be there has been such a case which has not been reported. That I do not know, but in the present case, being satisfied that I have jurisdiction to make this order for rectification, and being satisfied also that by making it I shall give effect to the intention of the parties as manifested in the document, I propose to do so.

Solicitors: *Gush, Phillips, Walters & Williams.*

(1) 2 P. Wms. 151.

F. C.

## *In re* BARING'S SETTLEMENT TRUSTS.

## BARING BROTHERS AND COMPANY, LIMITED *v.* LIDDELL.

[1939. B. 4384.]

*Settlement—Protective trusts—Sequestration of property of life tenant—Whether life interest determined.*

Under a settlement executed in 1921, certain funds were held upon protective trusts, the trustees being directed to pay the income to C. L. during her life until she should become bankrupt or assign or charge the income or any part thereof or until some other act or event should happen whereby the income or any part thereof, if belonging absolutely to her, would become vested in or payable to or charged in favour of some other person. It was further directed that after the determination in the life-time of C. L. of the trust in her favour, the trustees should during the remainder of her life or such shorter period as they should in their absolute discretion think fit, apply the income for the maintenance, personal support, and benefit of any one or more of a defined class of persons comprising C. L., her husband and her children or remoter issue. In 1935 C. L., being abroad with her infant children, failed to comply with an order of the Court to bring them within the jurisdiction and a writ of sequestration was issued empowering sequestrators to take possession of all her real and personal estate until she should do so. The sequestrators gave the trustees notice not to pay further moneys to her and required that the income should be paid to them but the trustees retained it in their hands. In 1939 C. L. brought the children within the jurisdiction and the writ of sequestration was dissolved:—

*Held*, that the settlor intended that there should be a continuous benefit to the beneficiaries and that, inasmuch as C. L. had been deprived of the personal enjoyment of the income, an event had happened which determined her life interest.

ADJOURNED SUMMONS.

By the joint effect of a settlement dated June 29, 1921, and a confirmatory deed dated September 28, 1921, a share in the trust funds thereby settled came to be held upon certain trusts in favour of the Hon. Calypso Liddell (hereinafter called "the wife"). It was directed that Baring Brothers & Co., Ld. (hereinafter called "the trustees"), should hold the funds in question "upon trust to pay the income thereof "to such child [the wife] during . . . . her life until . . . .

"she shall become bankrupt or shall assign or charge or "affect to assign or charge the said income or any part thereof "or until some other act or event shall happen (other than a "consent to any exercise of the power of advancement "hereinafter contained) whereby the said income or any part "thereof if belonging absolutely to such child would become "vested in or payable to or charged in favour of some other "person or a corporation and shall after the determination "during the life of such child of the trust in . . . . her "favour of the said income from time to time during the "remainder of the life of such child or during such shorter "period or periods either continuous or discontinuous as the "trustees in their absolute discretion think fit pay all or any "part of the said income to or apply the same for the "maintenance and personal support or benefit of all or any "one or more to the exclusion of the others or other of the "following persons namely the child whose life interest has "so become determined and any husband . . . . and any "child or remoter issue for the time being in existence of "such child and whether minors or adults and the other "persons or person for the time being entitled or interested "whether absolutely or contingently to or in such share "under the trusts herein contained to take effect after the "decease of such child in such proportion and manner as "the trustees shall in their absolute discretion from time to "time think proper and subject to the discretionary power "aforesaid shall during such remainder of the life of such "child hold the said income or so much thereof as shall not "be applied under such discretionary power upon the trusts "and for the purposes upon and for which the said income "would for the time being be held in case such child were "then dead."

In 1935, Guy Maynard Liddell (hereinafter called "the "husband") commenced an action against the wife for the purpose of making their infant children, Peter Liddell, Elizabeth Liddell, June Liddell and Anne Liddell (hereinafter called "the children"), wards of Court. The short title of the action was *In re Liddell's Settlement. Liddell* v. *Liddell*

(1935 L. 1579). The wife, who was then in the United States of America, was, by an order dated September 25, 1935, ordered to bring the children within the jurisdiction of the Court on or before October 16, 1935, or subsequently within twenty-one days after the service of the order on her. The order was served on her in New York on October 11, 1935, and she failed to comply with it within the time limited thereby.

On November 27, 1935, at the instance of the husband, a writ of sequestration was issued, whereby Cecil Liddell, David Liddell, William Charles Crocker and Walter Crocker (hereinafter called " the sequestrators ") were empowered to take possession of the wife's real and personal estate as sequestrators until she should, by bringing the children within the jurisdiction of the Court, clear her contempt, and the Court should make order to the contrary. On December 11, 1935, a copy of the writ was served on the trustees. On February 25, 1936, the Court of Appeal dismissed an appeal by the wife.

On February 26, 1936, the solicitors acting on behalf of the sequestrators gave the trustees formal notice to pay no further moneys to the wife, and on April 28, 1936, they wrote to them as follows: " On behalf of the sequestrators of the "income of the Hon. Calypso Liddell, we are instructed to "request you to be good enough to let us have a cheque for "the income at present in your hands payable under the "settlement dated June 29, 1921, and September 28, 1921 . . . . "It would be a matter of convenience to us if you would be "good enough to let us have all future monthly payments of "income . . . . at or about the 15th of each future month until "further notice." The trustees in fact retained in their hands the income payable under the settlement.

The wife returned to England with the children on December 19, 1938. On March 11, 1939, by an order made in the action, the writ of sequestration was dissolved.

The trustees took out a summons to determine whether, on the true construction of the settlement, the life interest of the wife in the income of the trust fund was determined by the issue of the writ of sequestration or by any act done by the sequestrators thereunder.

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Baring's Settlement Trusts, *In re.*
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*Pennycuick* for the trustees.

*Sir William Jowitt K.C.* and *W. F. Waite* (for the *Hon. Benjamin Bathurst*, on war service) for the wife. The life interest has not been determined. On the true construction of the clause and according to the intention of the settlor as manifested in it, forfeiture only occurs if the income or any part of it becomes payable to some persons other than the tenant for life so that they obtain a beneficial interest in it. The words of the clause are " become vested in or payable to or charged "in favour of some other person." The settlor had in mind the contrast between the tenant for life being beneficially entitled to the income and some other person being beneficially entitled to it. *Dixon* v. *Rowe* (1) is distinguishable from the present case because there the writ of sequestration was issued on account of the failure of the annuitant to pay a sum of money. The case of *In re Sartoris's Estate. Sartoris* v. *Sartoris* (2) is not the same as the present one, because though the receiver was entitled to receive the property, its ultimate destination was uncertain. They referred to *Seymour* v. *Lucas* (3); *White* v. *Chitty* (4); *In re James. Clutterbuck* v. *James* (5); *In re Hastings. Ex parte Brown* (6); *In re Tancred's Settlement. Somerville* v. *Tancred* (7); *In re Swannell. Morice* v. *Swannell* (8); *In re Laye. Turnbull* v. *Laye* (9); *In re Marshall. Marshall* v. *Whateley* (10); *In re Salting. Baillie-Hamilton* v. *Morgan.* (11)

*J. H. Stamp* for the husband and the children. The life interest determined on April 28, 1936, the date of the letter written to the trustees by the solicitors acting on behalf of the sequestrators. An event then happened whereby the income, if belonging absolutely to the tenant for life, would have become payable to some other persons, the sequestrators. Forfeiture occurs if she is deprived of the actual enjoyment of the income so that she can no longer use it for her own

(1) (1876) 35 L. T. 548.
(2) [1892] 1 Ch. 11.
(3) (1860) 1 Dr. & Sm. 177.
(4) (1866) L. R. 1 Eq. 372.
(5) (1890) 62 L. T. 454.
(6) (1892) 61 L. J. (Q. B.) 654.
(7) [1903] 1 Ch. 715.
(8) [1909] 101 L. T. 76.
(9) [1913] 1 Ch. 298.
(10) [1920] 1 Ch. 284.
(11) [1932] 2 Ch. 57.

purposes. The settlor intended a continuous benefit to the beneficiaries so that either the tenant for life should enjoy the income, or the discretionary trust should arise. The sequestration deprived the tenant for life of the income for an indefinite time. It cannot have been the intention of the settlor for both the tenant for life and the persons interested under the discretionary trust to be cut off from enjoyment of the income. He referred to *In re Sartoris's Estate.* (1)

*W. F. Waite* in reply. Forfeiture can only occur if circumstances arise in which the tenant for life is not the only beneficiary.

MORTON J. [having stated the facts :] In view of the course that the argument has taken I propose to confine my decision to the question whether or not Mrs. Liddell's life interest was determined on April 28, 1936, the date of the notice given by the trustees. Mr. Stamp, for the defendants other than Mrs. Liddell, says that on that date an event happened whereby the income of her share, if belonging absolutely to her, would have become payable to some other persons, namely, the sequestrators. It is clear that if the forfeiture clause in the settlement is read quite literally that argument must succeed. On the date in question the income, if belonging absolutely to Mrs. Liddell, would have become payable to the sequestrators ; but Sir William Jowitt for Mrs. Liddell invites me to put another construction on it which is, he says, consistent with the intention of the settlor as manifested in this clause. Reading the clause as a whole and reading the words " payable to " in their context, one finds that they are, as he points out, preceded by the words " vested in " and followed by the words " charged in favour of." He and Mr. Waite say, in effect, that the contrast which the settlor had in mind was between the child being entitled to the income and some other person becoming beneficially entitled to it, or to some part of it ; they say that, on the true construction of the clause, the forfeiture only arises if the income or part of it becomes payable to some persons, other

(1) [1892] 1 Ch. 11.

than the tenant for life, or some one acting for her or representing her, in such a way that they obtain a beneficial interest in it. It is necessary, they say, that a situation must have arisen in which the tenant for life is not the only beneficiary. That was the phrase used by Mr. Waite, in reply.

Mr. Stamp, on the contrary (although he does not ask me to read the words in their completely literal sense) contends that it is enough to give rise to a forfeiture if the tenant for life is deprived of the actual enjoyment of the income so that she can no longer put her hands upon it and use it for her own purposes. He contrasts the position while the sequestration order was in force with the case in which the income becomes payable to somebody who is merely a trustee for the tenant for life or an agent for her, in such circumstances that she can get it from that trustee or agent at any time.

In his very helpful review of the authorities, Sir William Jowitt, though he did not suggest that the problem which I have to consider is completely covered by authority, cited a number of cases which bear upon that problem in a greater or less degree.

The first case is that of *Seymour* v. *Lucas*. (1) The side note is as follows: "Testator limited real and personal estate to "trustees for A.B. for life; with a limitation over in case he "should thereafter become bankrupt or insolvent, etc., or if "by his act or default the rents, etc., should become vested "in or payable to any other person. The tenant for life was "insolvent before the date of the will; there was the usual "power of attorney, and judgment was entered up, but "nothing further done, and the tenant for life did not in "any manner alienate after the date of the will. *Held*: "(1.) That judgment, without more, only operated as an "equitable charge, and did not vest the rents in or make them "payable to the assignees . . . ." Another point dealt with in that case is not material for the present purposes. Kindersley V.-C. in dealing with the point whether the rents vested in or were payable to other persons, said this (1): "The question "is, whether any one of the several events pointed out has

(1) 1 Dr. & Sm. 177, 180.

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"happened, because it may be that some one of them has "happened, though the others have not. Now I will not "consider them in their order, but take the last first." He then read the forfeiture clause and continued: "Upon that "the question is whether by any means the rents have become "vested in or payable to any other person than Frederick "Richard Chadwick, and I am of opinion that they have not. "There was an insolvency; but it does not signify on this "part of the case whether it was prior or subsequent to the "death of the testator. The question is only, have the rents "become payable to or vested in the assignee? Now, there "was the usual warrant of attorney executed, and judgment "has been since entered up, and that is all, nothing further "has been done. What, then, is the effect of the judgment "entered up? It is that, under the 13th section of the 1 & 2 "Victoria c. 110 judgment shall operate as a charge; it will "operate precisely in the same way and to the same extent as if "there had been an agreement by F. R. Chadwick with the "assignee to give him a charge; it has no greater effect. "Now, if there had been such a contract, would that make the "rents vested in or payable to the assignees? I think not. "The party having the charge might institute a suit to obtain "the benefit of his charge, but he would have no immediate "right to receive the rents, nor would they be vested in him. "I think, therefore, that the event last referred to has not "happened." The judgment on that point seems to me to rest on the fact that there was nobody, in the events which happened, who had an immediate right to receive the rents. In the present case the sequestrators, if the income had belonged to Mrs. Liddell absolutely, would have had an immediate right to receive the rents by reason of their appointment as sequestrators. I do not think that that case is of any real assistance to her.

The next case is that of *White* v. *Chitty*. (1) The headnote is as follows: "Testator devised freeholds to C. for life, "with a clause of forfeiture on bankruptcy. In the testator's "lifetime, C. was adjudicated a bankrupt, and had not

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(1) L. R. 1 Eq. 372, 377.

"obtained his order of discharge at the testator's death; "but no creditors' assignee was ever appointed; and within "four months after the testator's death, the bankrupt applied "for and obtained an annulment of the bankruptcy. The "official assignee had not, during the interval, applied for or "obtained possession of the rents, C. himself having been in "occupation of the estate:—*Held*, following the authorities, "that the clause must extend to a bankruptcy occurring in "the testator's lifetime but that as the bankrupt, by his "diligence, had obtained an annulment of the bankruptcy "before any claim made, or property handed or paid over, the "forfeiture contemplated by the testator had not occurred." I think the gist of the decision of Page Wood V.-C. may be found in the following words (1): "I am bound to hold that "the act of forfeiture in this instance never occurred, because "this gentleman has always been in possession and receipt "of these rents, nobody else having been in a position to "receive them." That case again, I think, is clearly distinguishable from the present case.

The next case is that of *Dixon* v. *Rowe*. (2) The headnote is as follows: "Testator gave an annuity to the plaintiff for "life, or until he should assign or encumber his interest under "the will, or any part thereof, or until he should do or suffer "some act or thing, or something should occur, whereby his "interest under the will, or any part thereof, should, or might "be, or but for that stipulation would, become vested in some "other person, or whereby he would cease to be beneficially "in receipt of the annuity; the testator also gave two other "specific gifts to the plaintiff, to which the same clause of "forfeiture was by reference appended, and a share of the "ultimate residue of his estate to which the forfeiture clause "did not apply. In December, 1874, a writ of sequestration "was issued against the plaintiff. Upon this the trustees of "the will were advised that the forfeiture took effect, and "they ceased to pay the proceeds of the annuity and the "other gifts to the plaintiff. In March, 1875, the plaintiff "commenced this suit against them. In May, 1875, the

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(1) L. R. 1 Eq. 372, 377.

(2) 35 L. T. 548.

"plaintiff's interest in the residue of the testator's estate was "sold under an order of the court that issued the writ of "sequestration. A special case was stated for the opinion "of the court as to whether the plaintiff's interest under the "will had not ceased under the forfeiture clause. *Held*, that "plaintiff was no longer entitled to receive the annuity, or "the proceeds of the other gifts, which ceased to be payable "from the date of the sale of the residue; that all further "proceedings in the suit must be stayed, and that plaintiff "must pay the costs of the suit and the special case. *Held*, "also, that plaintiff had no ground of action against the "trustees, and that they were perfectly right in refusing to "pay the annuity and proceeds of the other gifts after the "issue of the writ of sequestration, and that plaintiff must "pay the costs of a motion made to restrain their paying "them to anyone but himself."

The first portion of that statement of the decision at first sight appears to indicate that the forfeiture took place on and not before the sale of the residue. If that had been so this case would have been of some assistance to Sir William Jowitt's argument, but the full decision was as follows. Bacon V.-C. first of all dealt with the construction of the will, but I need not read that portion of the judgment. He then stated (1): "I therefore must hold that the plaintiff "is not entitled to receive the annuity of 90*l.*, that he is not "entitled to receive any longer that part of the rents of "Providence Wharf, nor the rents and profits of 27, "Tennyson-street, given upon the same trusts as were "declared concerning the annuity of 90*l.*, all which ceased "to be payable from the 6th May, the date of the sale to "Wingfield, at which time the 'vesting' contemplated by the "testator operated."

If the judgment had ended there (the sale having taken place in May, 1875, and the writ of sequestration having been issued in December, 1874) it would have appeared to be a decision that the issue of the writ of sequestration did not give rise to a forfeiture. But there followed an argument with regard to the suit which the plaintiff had commenced against the trustees in March, 1875; that is to say, between the date of the writ of sequestration and that of the sale. The Vice-Chancellor's decision was stated as follows (1): "The "Vice-Chancellor held that the plaintiff had no right to file "his bill after the sequestration was issued, and that the "trustees were quite right. The order would, therefore, be "to stay all further proceedings in the suit, the plaintiff to "pay the costs of the suit, and the costs of the motion, and "special case." It appears to me that the Vice-Chancellor in the first instance held that the sale had brought the life interest to an end; but then, his attention having been drawn to the effect of the writ of sequestration, he took the view that the writ had also the effect of causing a forfeiture; otherwise I do not see how he could have held that "the "plaintiff had no right to file his bill after the sequestration "was issued, and that the trustees were quite right." It is true that there is a distinction between the case of *Dixon* v. *Rowe* (1) and the present case, in that the plaintiff in *Dixon* v. *Rowe* had failed to pay a sum of money, and it was the non-payment of that sum which led to the writ of sequestration being issued. Counsel for Mrs. Liddell relied on this distinction.

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(1) 35 L. T. 548, 550.

The next case is that of *In re James. Clutterbuck* v. *James.* (2) I do not think I need go through all the facts in that case because Kekewich J. founded his judgment, as I read it, upon the fact that the events which had happened did not have the result that the right to receive the income had vested in any person other than the tenant for life. That being so, he held that the income if belonging absolutely to the tenant for life would not have become vested in any other person or persons. He said (2): "I ground my decision . . . . "simply on this—that the right to receive the income never "became vested in any other person." And on that ground the case is clearly distinguishable from the present one.

The next case is that of *In re Hastings. Ex parte Brown.* (3)

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(1) 35 L. T. 548, 551.

(2) 62 L. T. 454, 455.

(3) 61 L. J. (Q. B.) 654.

The headnote is as follows: "A writ of sequestration had "been issued out of the Chancery Division to enforce payment "into court, under which the debtor's property, both real "and personal, was seized. Before sale the debtor was "adjudicated bankrupt upon the petition of other creditors, "and the Judge of the County Court granted an injunction, "under section 10 of the Bankruptcy Act, 1883, restraining "the sale:—*Held*, that the sequestrator was a creditor within "section 9, clause 1; that he was not a secured creditor "within the proviso in clause 2; that he was not an execution "creditor who had completed an execution or attachment "within section 45; and that the Court had jurisdiction to "restrain the sale." The decision, so far as the present case is concerned, merely amounts to this, that the sequestrator is not a secured creditor. It does not, I think, throw any real light on the point which I have to decide, the position in the present case being that the sequestrators had a right to receive the money by virtue of the order of the Court and the notice given to the trustees. It is not suggested that they had a charge or lien or security within the meaning of the Bankruptcy Acts.

The next case (which was strongly relied upon by Mr. Stamp) is that of *In re Sartoris's Estate. Sartoris* v. *Sartoris* (1), a decision of Chitty J., affirmed in the Court of Appeal. In that case the headnote is as follows: "A "testator bequeathed the income of his residuary estate to "his son during his life, or until he should assign or dispose "of the income or some part thereof, 'or become bankrupt, "'or do or suffer something whereby the said income if "'belonging absolutely to him, or some part thereof, would "'become payable to or vested in some other person.' In "October, 1890, a petition in bankruptcy was filed against "the son, and in November, 1890, a receiving order was "made. A meeting of creditors was held in December and "adjourned till January, when it was adjourned again, and "nothing further had been done in the matter:—*Held* "(affirming the decision of Chitty J.), that though the income

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(1) [1892] 1 Ch. 11, 14.

"did not vest in the official receiver, it would, by force of "the receiving order have become payable to him if it had "belonged absolutely to the tenant for life, and that the "interest of the tenant for life had determined."

Chitty J. in the course of considering the effect of a receiving order under the Bankruptcy Act, 1883, said this (1): "Upon the Act of Parliament it is quite clear that the "debtor's property does not pass to the receiver; but it is "equally clear that it is the duty of the receiver to execute "his office, and to receive whatever property the debtor "may have. If there is property in the debtor's possession, "the receiver intervenes by taking possession for the purposes "of protecting the property, and seeing that it reaches its "ultimate destination, whatever that may be, according to "the result of the bankruptcy proceedings."

It was pointed out by counsel for Mrs. Liddell that there is a distinction between that case and the present case, in that not only was the receiver entitled to receive the property, but its ultimate destination was uncertain and some part of it, or indeed the whole of it, might have gone to a person other than the bankrupt. I agree there is that distinction between *In re Sartoris's Estate* (1) and the present case, and that it is not therefore an authority which decides the point which I have to decide. But there are certain observations in the judgment of Chitty J. and of the Court of Appeal which I find of assistance. Chitty J. said this (2): "Having thus ascertained the effect of a receiving "order, I proceed to ascertain the true meaning of the "testator according to the clauses in his will. I was told by "counsel for Mr. Algernon Sartoris that in construing clauses "of this kind the Court ought to adopt a benevolent view "of the clause—benevolent, that is to say, to the person "whose life interest is to cease under the clause; and it is "said that the clause ought to be construed strictly, which "is another mode of expressing the same thing. In my "opinion neither of these phrases is useful or proper. I think "it is the duty of the Court to read the testator's language

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(1) [1892] 1 Ch. 11, 14.

(2) Ibid. 16.

"and ascertain from what he has said what he means, and "if his intention is properly expressed and lawful, to give "effect to it. It is to be remembered, though it seems to "have been forgotten or probably passed by as an "inconvenient topic by the counsel who were arguing for "Mr. Sartoris, that he is not the sole object of the testator's "bounty, but there are under this clause other persons who "are equally the objects upon whom the testator intends to "confer a benefit. This clause, like many others that I have "had before me, is really to the effect that the income shall "be possessed by a certain person until the happening of a "certain event, and after the happening of that event it "shall be paid to some other person. Where the events are "events which the law allows, the right way is to read the "clause attentively, and to ascertain from the clause itself "what the testator means." With these observations I most respectfully agree. It is often said in the course of argument (although it was not put forward before me to-day) that the Court should adopt a benevolent view or should lean against a forfeiture or should construe the forfeiture clause strictly. To my mind the position is as stated by Chitty J. and these phrases mean nothing more than this, that if after the Court has gone through the process of construing the clause described by Chitty J. there remains a real doubt in its mind as to whether there has been a forfeiture, then that doubt should be resolved against a forfeiture. The burden is upon those who allege a forfeiture to satisfy the Court that it has occurred.

Chitty J. went on (1): "The testator says that the income "is to go to his son during his life, or until he shall assign, "charge, or otherwise dispose of the said income or some part "thereof, or become bankrupt, or do or suffer something "whereby the said income if belonging to him absolutely, "or some part thereof, would become payable to, or vested in, "some other person, whichever of the said events should first "happen; and if the trusts hereinbefore declared should "determine in the lifetime of Mr. Sartoris, then during the

(1) [1892] 1 Ch. 11, 16.

"remainder of his life, on trusts, which may be shortly described "as trusts for the benefit of himself, his wife, and his children "under an exclusive power—that is, the power given to trustees "under which they may apply the income for the benefit of "any one or more of the objects—a power in their absolute "discretion. The material words in this case are 'do or suffer "'something whereby the said income, if belonging absolutely "'to him, or some part thereof, would become payable to or "'vested in some other person.' It was argued that there was "no distinction between the words 'payable to' or 'vested in.' "In my opinion that argument cannot be maintained. This "will was made in 1887, and it is not the practice or the duty "of the Court to attribute to any testator ignorance of the law "unless there is something in the will to justify it. In this case "it appears to me that the testator has endeavoured to express "himself accurately, and I have no right to say that the two "phrases that he has used, that is, 'payable to' or 'vested in,' "are identical in meaning, unless I can find some sufficient "ground for so doing. The history of these clauses is well "known. Those who assist testators in framing them become "aware from time to time of decisions, and if they find that new "cases arise and the old forms are insufficient to meet the "event, which is intended to be the event, testators come with "the assistance of those learned in the law by degrees, as we "see, to draw these clauses more and more carefully. This "clause on the face of it is carefully expressed, and I am not at "liberty to reject the words 'payable to.'"

In the present case I have three alternatives specified in this particular part of the will: "vested in or payable to or charged "in favour of," and it seems to me, to quote the words of Chitty J. (1), that "I have no right to say that the two phrases "that he has used, that is, 'payable to' or 'vested in,' are "identical in meaning."

Chitty J. continued (1): "Now, that being my view of "the construction of the clause, the question is, has the "income or some part thereof become 'payable to' some "other person than Mr. Sartoris? It appears to me that

(1) [1892] 1 Ch. 11, 17.

"there is only one possible answer to that question." And the learned judge answers it in the affirmative.

There is one passage which I desire to read from the judgment of Lindley L.J. in the Court of Appeal. He said this (1): "What is the effect of appointing a receiver in the "Chancery Division? It operates as an injunction restraining "the defendant from getting in money which the receiver is "appointed to receive. The fallacy of the appellant's argument "is that as income to which the debtor is entitled does not "vest in the receiver and so he cannot sue for it in his own "name, therefore the debtor is still the party to receive it." I think that passage is of some assistance in that it draws attention to the fact that the effect of appointing a receiver was to restrain the defendant from getting in money.

The next case (with which I can deal quite shortly) is that of *In re Tancred's Settlement. Somerville* v. *Tancred.* (2) In that case, according to the headnote: "A person entitled "to a life interest, determinable if he should dispose or attempt "to dispose of it, assigned it to the trustees of his marriage "settlement upon trusts under which he was to receive the "income for life. By the settlement he appointed the trustees "his attorneys to receive the income, and gave them power "to pay the expenses of managing the trusts:—*Held*, that "this was not a disposition or attempted disposition of his "life interest so as to cause it to be forfeited." I think it is a correct comment upon that case to say that all that the life tenant did was to alter his mode of enjoyment.

Buckley J., as he then was, said this (3): "The clause is "intended to provide that, if a tenant for life disposes or "attempts to dispose of his interest so as to lose the enjoyment "of it himself, or if he should become bankrupt, his life "estate should cease and be given over to others. This has "not happened. Seymer Mitford Tancred remained after the "settlement the only person entitled to the income. The "mere fact that the trustees may be entitled to have their "expenses recouped to them out of the income does not make

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(1) [1892] 1 Ch. 11, 22.

(2) [1903] 1 Ch. 715.

(3) [1903] 1 Ch. 715, 724.

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"it a disposition within the clause. It is parallel to the case "of a person who is going abroad and appoints somebody to "collect his rents on the terms that he should be paid by "deducting a commission. Neither is the appointment of the "trustees to be his attorneys to recover the income an "assignment. He only appointed them to act as his agents, "retaining the beneficial interest himself."

The position there was that Mr. Tancred, although he had assigned the life interest to trustees of his marriage settlement, was in a position to put his hand upon the income at any time. It is true that the decision does show that the mere fact that the trustees were entitled to take their expenses out of the income did not make the assignment a disposition within the clause. That might have been material had Mr. Stamp relied in the present case upon any rights which the sequestrators would have to retain their expenses out of the income, but he has not put forward any such argument.

The next case is that of *In re Swannell. Morice* v. *Swannell* (1), a decision of Eve J. That was a case where an attorney had been appointed to receive the income, and it was held that the power of attorney being a mere authority to receive the income, this did not constitute a forfeiture within the meaning of the forfeiture clause. In that case the effect of the execution of the power of attorney did not deprive the tenant for life of the right to receive the income, and Eve J. held that there was no forfeiture.

The next case is that of *In re Laye. Turnbull* v. *Laye* (2), also a decision of Eve J., who held, according to the headnote: "that in all cases in which the life interest is to determine on "the happening of any event, whereby the income or any "part of it would, if belonging absolutely to the tenant for life, "be payable to some other person, such determination is "brought about wherever a receiving order is made and "income comes to the hands of the trustees before it is "discharged."

That again is distinguishable from the present case on the ground, to which I have already referred in connection with other authorities, that the making of the receiving order was consequent upon the failure of the tenant for life to pay his creditors.

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(1) 101 L. T. 76.

(2) [1913] 1 Ch. 298.

Another case referred to before me was that of *In re Marshall. Marshall* v. *Whateley* (1), where it was held that an order in lunacy appointing a receiver did not operate as a forfeiture under the clause " until he shall become bankrupt or shall "assign or charge or affect to assign or charge the said income "or some part thereof or until some other event shall happen "whereby if the income belonged absolutely to him he would "be wholly or partially deprived of the personal enjoyment "thereof."

Lastly, there was the case of *In re Salting. Baillie-Hamilton* v. *Morgan.* (2) I do not think that either of the two last-mentioned cases is of any real assistance in the problem which I have to consider.

These being the authorities I have to make up my mind whether there has or has not been a forfeiture in this case. In my view there has. I think it is true to say that having regard to such cases as *In re Tancred's Settlement* (3) and *In re Swannell* (4), one cannot read the words " payable to "some other person " in a completely literal sense ; but to my mind, on the true construction of this clause, the settlor did intend that if an event happened whereby, if the income had belonged absolutely to the tenant for life, she would have been deprived of the personal enjoyment of it and the right to hold it and spend it and use it, then a forfeiture should occur. I think he intended that there should be, as Mr. Stamp put it, a continuous benefit to the beneficiaries so that either the tenant for life should be in a position to have the income or the discretionary trust should arise.

The result of giving effect to the arguments of Sir William Jowitt and Mr. Waite would be curious in this respect. The sequestration might have lasted for years ; it might have lasted indeed for the whole of the life of the tenant for life, for she might have stayed in America and refused to come back; yet if the argument on her behalf is correct she could not have touched the income because of the sequestration, and the income would have been piling up in the hands either of the sequestrators or of the trustees, if they declined to hand it over, and would not have been applicable under the discretionary trust. I do not think that such a result as that is in accordance with the intention of the testator; he intended that there should be a continuous benefit under this clause, either to Mrs. Liddell or to the objects of the discretionary trust.

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(1) [1920] 1 Ch. 284.
(2) [1932] 2 Ch. 57.
(3) [1903] 1 Ch. 715.
(4) 101 L. T. 76.

For these reasons I hold that an event happened, within the meaning of the clause, which determined the life interest.

Solicitors: *Freshfields, Leese & Munns; Gordon, Dadds & Co.; William Charles Crocker.*

F. C.

# MOSCROP *v.* LONDON PASSENGER TRANSPORT BOARD.

[1939. M. 1565.]

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May 8, 9, 27.

*Trade Union—Employees of public authority—Charges before divisional superintendents and appeals from their decisions—Employees given right to be represented by transport union official—Employee not a member—Whether condition imposed placing him under disability—Trade Disputes and Trade Unions Act,* 1927 (17 & 18 *Geo.* 5, *c.* 22), *s.* 6.

It was a term of the employment of the plaintiff, an omnibus driver in the service of the defendants, a public authority controlling a system of public conveyances, that drivers and conductors appearing before a divisional superintendent hearing charges of alleged breaches of discipline, or on appeal, might be accompanied by an official of a named transport trade union acting as advocate. On the hearing of an appeal by the plaintiff from a decision of a divisional superintendent, the defendants refused to allow him to be accompanied by an official of a different trade union to which he belonged and, since he was not a member of the union referred to in the terms of his employment, its officials would not have accompanied him:—

*Held,* that the defendants had not imposed a condition on the plaintiff whereby he was denied the advantage of representation by an official of his own trade union and that, accordingly, they had not contravened the provisions of s. 6 of the Trade Disputes and Trade Unions Act, 1927.

WITNESS ACTION.

On April 12, 1928, Archibald Moscrop (hereinafter called " the plaintiff "), an omnibus driver, entered the employment of the London General Omnibus Company, Ld. (hereinafter called " the company "). In 1933, by virtue of the London Passenger Transport Act, 1933, the London Passenger Transport Board (hereinafter called "the defendant Board"), became his employers in succession to the company. From April 12, 1928, it was a term of his employment that : " Appeals in "respect of any disciplinary action shall be heard weekly "before a properly constituted disciplinary board. Drivers "and conductors attending such appeals shall be allowed . . . . "to be accompanied by a representative of the Union." The union referred to was the Transport and General Workers Union (hereinafter called " the Transport Union "), which the plaintiff joined shortly after the commencement of his employment, and which till 1938, was the only trade union concerned with omnibus drivers and conductors (hereinafter called " the platform staff ").

The terms of an agreement, dated June 15, 1937, between the defendant Board and the Transport Union, provided (inter alia): " Appeals against depot superintendents' "decisions shall be heard by the divisional superintendent "concerned. Divisional superintendents may also hear "charges in the first instance, according to the gravity of the "charge. Appeals against the decisions of the divisional "superintendents shall be heard weekly before a properly "constituted disciplinary board. There may be a final appeal "to the general manager or his representative. Drivers and "conductors attending such appeals shall be allowed to appear "in plain clothes. Drivers and conductors appearing before "a divisional superintendent or on appeal may be accompanied "by an official of the union. If the appeal succeeds, the "appellant shall be entitled to pay for the time lost." This provision was thereafter a term of the plaintiff's employment.

The evidence showed that throughout the term of the plaintiff's employment the company and the defendant Board had granted the platform staff, when they appeared before a divisional inspector or appealed from his decisions, the privilege of being accompanied by an official of the Transport Union who was allowed to speak on their behalf as an advocate. Though, so far as the defendant Board were concerned, the privilege could be exercised by any member of the platform staff, not all of them were members of the Transport Union, the officials of which would not appear on behalf of a man who was not a member or whose contributions were more than six weeks in arrear.

Shortly after June 15, 1937, the plaintiff ceased to pay his contributions to the Transport Union, and in or before December, 1937, he ceased to be a member. In February, 1938, the National Passenger Workers' Union (hereinafter called " the " National Union ") was formed, and he became a member of it.

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In February, 1939, the plaintiff, having been reported for failing to stop for a passenger at a certain point, was "cautioned" by the depot superintendent, who decided that he was not justified in failing to stop. On an appeal, at the hearing of which he appeared, without seeking to be represented, the decision was affirmed by the divisional superintendent. The plaintiff appealed to the disciplinary board, and when he appeared before that board on April 18, 1939, was accompanied by the general secretary of the National Union to present his case. The defendant Board refused to allow him to be represented. It appeared from the evidence (1.) that no official of the Transport Union would have accompanied him, because he was not a member; and (2.) that if he had been accompanied by an official of that union, the defendant Board would have allowed that official to represent him.

On May 18, 1939, the plaintiff commenced an action against the defendant Board, claiming by claim 1 of the statement of claim, "a declaration that the condition of the plaintiff's em-"ployment with the defendants, whereby the plaintiff is denied, "as an appellant before the defendants' disciplinary board, "the advantage of representation by an official of his own "trade union, while such advantage is granted to or is the "right of other servants of the defendants who are members "of another . . . . trade union is unlawful."

*H. U. Willink K.C.* and *H. E. Salt* for the defendant Board. It is not disputed that the defendants are a "public authority": London Passenger Transport Act, 1933, s. 1, sub-s. 1. It is denied, however, that there has been any contravention of s. 6 of the Trade Disputes and Trade Unions Act, 1927. (1)

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(1) By s. 6 of the Trade Disputes and Trade Unions Act, 1927: "(1.) It shall not be lawful for any "local or other public authority "to make it a condition of the "employment or continuance in "employment of any person that "he shall or shall not be a member "of a trade union, or to impose "any condition upon persons em-"ployed by the authority whereby "employees who are or who are "not members of a trade union "are liable to be placed in any "respect either directly or in-"directly under any disability or "disadvantage as compared with "other employees. (2.) It shall

The defendants have not imposed any condition on the plaintiff within the meaning of that section. On the contrary, he is seeking to impose a condition on them that if a member of the National Union so desires it, they must hear a representative of that union. The section only deals with discrimination between union men and non-union men. It does not relate to discrimination between members of one trade union and another. The defendants were not, apart from special contract, bound to admit any third party to investigations of alleged breaches of discipline on the part of their employees.

*W. P. Spens K.C.* and *R. Moelwyn Hughes* for the plaintiff. The defendants have unlawfully imposed on the plaintiff a condition within the latter part of s. 6, sub-s. 1, of the Act. That condition is rendered void by sub-s. 3. It denied the plaintiff as an appellant before the disciplinary board the advantage of representation by an official of his own trade union. It is irrelevant how or when that condition was imposed. The scope of the section is not confined to cases of discrimination between union men and non-union men: *Attorney-General* v. *Birkenhead Corporation.* (1) It is easy to impose a restrictive condition by offering limited facilities. There is no difference between saying: "Unless you are a member of this trade union "you shall not have the right to be represented," and saying: "We offer any member of this trade union the right of being "represented." The existing fact is that the plaintiff is placed at a disadvantage by the refusal to allow him to be represented. If the defendants wished to be consistent they would not allow representation to any of their employees.

*Cur. adv. vult.*

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"not be lawful for any local or "other public authority to make "it a condition of any contract "made or proposed to be made "with the authority, or of the "consideration or acceptance of "any tender in connection with "such a contract, that any person "to be employed by any party to "the contract shall or shall not be "a member of a trade union. "(3.) Any condition imposed in "contravention of this section "shall be void. . . . . "

(1) (1928) 93 J. P. 33.

MORTON J. [having stated the facts:] The plaintiff's case rests solely on the provisions of s. 6 of the Trade Disputes and Trade Unions Act, 1927. There can be no doubt that apart from that Act the defendant Board would be entitled to say: "We are willing to hear an official of the Transport Union on "appeals, or to hear the employee himself, but we shall hear "no-one else."

In order to succeed, the plaintiff must establish first that the defendant Board has imposed a condition upon the plaintiff whereby (to quote the statement of claim) he "is denied, as an "appellant before the defendants' disciplinary board, the "advantage of representation by an official of his own trade "union." I omit, for the moment, the remainder of claim 1, since it is essential for the plaintiff to establish in the first place that this condition has been imposed upon him by the Board within the meaning of s. 6. Secondly, the plaintiff must establish that by imposing such a condition the defendant Board has contravened the provisions of s. 6 of the Act of 1927.

On the first point, Mr. Spens, for the plaintiff, says it is clear that the condition which I have just stated was imposed by the Board upon the plaintiff. He says in effect: "I care not "when or how it was imposed. It is enough for my case "that it was in force on April 18, 1939, and was put in force "against the plaintiff when he sought to be represented by an "official of his Union on that date." At first sight I find this argument attractive, but I am considering a statute which makes something unlawful which would otherwise have been lawful, and I must see whether the defendant Board has imposed this condition within the meaning of s. 6.

It is suggested by Mr. Willink, for the defendant Board, that the Board has not imposed this condition on the plaintiff, but that the plaintiff is seeking by this action to impose a condition on the Board, namely, the condition that they must hear a representative of the National Union on appeals if a member of that union so desires.

Now it is undoubtedly the fact that the plaintiff was in April, 1939, and is now unable to be accompanied on an appeal by an official of his own trade union. It is also the fact that he was in April, 1939, and is now unable to be accompanied by a barrister or solicitor. These facts are not, however, in my view, the result of the imposing of any condition by the defendant Board. Apart from any express term in an employee's contract of service, the defendant Board is in no way bound to allow the presence of a third party on the investigation of an alleged breach of discipline by an employee. All that the Board has done in the present case is to contract with all members of its platform staff that they may be accompanied by an official of the Transport Union at the hearing of an appeal. That was a privilege, and I do not doubt that it was a valued privilege. At the time it was granted, and right on until February, 1938, according to the evidence, the Transport Union was the only trade union to which members of the platform staff belonged. Apparently they did not all belong to it, but the Board was in no way concerned as to whether any particular man belonged to it or not. The Board said, in effect, to all members of its platform staff: " So far as we are concerned, you can be "accompanied by an official of the Transport Union." It is true that the officials of the Transport Union would not appear for a non-member or for a member who was not "in benefit," that is, whose contributions were more than six weeks in arrear. That, however, was a matter between the Transport Union and the men. It rested entirely within the volition of each individual man whether he did or did not belong to the Transport Union or keep up his contributions.

It may be said that by specifying that men could be accompanied by officials of the Transport Union the Board impliedly stated that men could not be accompanied by anyone else. Assuming that to be true, in my judgment it is a misuse of language to describe this as "imposing a "condition." If I say to my neighbour "Your children may "play in my garden on Mondays and Wednesdays," is it a fair use of language to say to me "You are imposing a condition "that the children may not play there on the other five days of "the week"? I think not, and I do not think it is a fair construction of the section to say that by giving to all their platform staff the right (which they would not otherwise possess) of being represented by a particular class of advocate, the Board imposes a condition that they shall not be represented by anyone else. The reason why they cannot be represented by anyone else is this, that apart from any special contract the Board is not bound to admit any third party to their investigations of alleged breaches of discipline by an employee.

Let me further test the plaintiff's case by inquiring when the condition of which he complains was imposed. The condition in question is a condition whereby he is "denied as an appellant "before the defendants' disciplinary board the advantage of "representation by an official of his own trade union." His own trade union is the National Union. Was that condition imposed at the time when the plaintiff entered the employment of the defendants' predecessors in 1928, or was it imposed when the plaintiff accepted, as I am satisfied he did accept, the terms of the agreement of June 15, 1937? I do not think it was imposed on either of these occasions. Apart from the facts that the National Union was not in existence on either of these dates, and that the Transport Union was the only union to which members of the platform staff belonged, I do not think that the grant of the privilege of being accompanied by an official of the Transport Union can fairly be described as the imposing of a condition, for the reasons which I have already stated.

Was the condition of which the plaintiff complains imposed between June 15, 1937, and the issue of the writ? In my judgment, it was not. Between these dates the plaintiff ceased, by reason of his own deliberate act or omission, to be a member of the Transport Union. Thereby he deprived himself of all possibility of being accompanied by an official of the Transport Union. Between those dates the defendant Board did not change its attitude at all. It in no way altered the terms of the plaintiff's employment. So far as the Board was concerned, the plaintiff was still free to be accompanied by an official of the Transport Union. It was the plaintiff who

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brought about a state of affairs in which the Transport Union would not allow any of its officials to accompany him. I cannot see how the Board can be said to have imposed any condition during that period.

I think the true view of this action is that the plaintiff is seeking to impose a condition on the defendant Board that members of the National Union shall be allowed the assistance of an official of their own union on the hearing of appeals, so long as members of the Transport Union enjoy that privilege. The question whether this would or would not be a good arrangement does not arise for decision by me, and I may add that, according to the evidence, no negotiations on the subject have ever taken place between the National Union and the Board. I have only to decide whether or not the defendant Board has contravened the provisions of a particular statute.

In my view the plaintiff has failed to establish that the defendant Board has imposed the condition of which he complains in his statement of claim and on this ground I dismiss the action. It is therefore unnecessary for me to express any concluded view on the second question which I have mentioned, namely, the question whether, if the Board has imposed this condition, it is a condition which is rendered unlawful by s. 6 of the Act.

It has been argued by Mr. Willink that this section only deals with cases of discrimination between union men and non-union men, and that it does not cover the case of discrimination between members of trade union A and members of trade union B. I think there is some force in this argument, though it involves a somewhat narrow construction of the section.

I was referred by Mr. Spens to the case of *Attorney-General* v. *Birkenhead Corporation*. (1) There are passages in the judgment of Maugham J. as he then was, which may indicate a view contrary to the argument presented to me by Mr. Willink on this point, but the actual decision does not deal with this matter, as Mr. Spens conceded. I do not

(1) 93 J. P. 33.

think that I should serve any useful purpose by expressing a view on this point which must necessarily be obiter having regard to the view which I have taken on the first question arising in this action.

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MOSCROP v. LONDON PASSENGER TRANSPORT BOARD.

Solicitors: *Cole & Matthews; R. McDonald, Solicitor to London Passenger Transport Board.*

F. C.

BENNETT
J.

1940

*June* 14.

## *In re* HENDERSON.

## HENDERSON *v.* HENDERSON.

[1940. H. 1122.]

*Followed. In re* A SOLICITOR [1952] 1 Ch. 328

*Trust—Trustees of will—Appointment of new trustee—Former trustee unwilling to retire—Jurisdiction of Court—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 41, *sub-s.* 1.

A testator, who bequeathed his residuary estate to his widow for life and after her death to his niece absolutely, appointed them trustees of his will. Subsequently the widow took out a summons to determine certain questions relating to the trust and asked (inter alia) that the Public Trustee might be appointed in place of herself, stating in her affidavit that, having regard to the differences which had arisen between the niece and herself as to the administration of the trust and the conflict of interest arising from the niece's position as trustee and reversioner, she wished to retire provided the Public Trustee were appointed in her place. The niece in her affidavit stated that she was prepared to take any steps necessary for effecting the appointment of the Public Trustee and the order made on the summons recited her undertaking to concur with the widow in appointing him. Subsequently the widow refused to retire unless an undertaking were given that the administration of the trust would be conducted in the Public Trustee's office and that independent solicitors would be employed. The niece took out a summons asking that the Public Trustee might be appointed under s. 41 of the Trustee Act, 1925, in place of the widow:—

*Held,* (1.) that where there is no dispute of fact the Court has jurisdiction under s. 41 of the Act to displace a trustee against his will and appoint a new trustee in substitution for him;

(2.) that on the undisputed facts of the present case, it was expedient to appoint the Public Trustee in place of the widow.

*In re Combs* (1884) 51 L. T. 45 distinguished.

ADJOURNED SUMMONS.

Charles Henderson, the testator, made his will on September 25, 1930, and a codicil thereto on August 26, 1931. He died on March 20, 1932. By his will he appointed his wife Lulu Henderson (hereinafter called "the widow") and his niece Ellen Henderson (hereinafter called "the "niece") to be his executrices and trustees. By the codicil he directed that his residuary estate should be held in trust to pay the income to the widow during her life and that after her death it should be held both as to capital and income in trust for the niece absolutely. The widow and the niece proved the will on July 6, 1932.

On December 16, 1938, the widow took out an originating summons to which the niece was the defendant: *In re Henderson. Henderson* v. *Henderson* (1938. H. 4129). She asked that the niece might be ordered to allow her to inspect the trust accounts and sought certain relief with regard to some furniture. She also asked that the Public Trustee might be appointed a trustee in place of herself. In her affidavit she stated: "Having regard to the differences which have arisen "between the defendant and myself as to the administration "of the trust estate and the conflict of interest arising from "the defendant's position as an executor trustee and reversioner "I am desirous of retiring from the trust provided that the "Public Trustee be appointed in my place." The niece stated in her affidavit: "While I should have preferred in view of "the size of the estate that a suitable unpaid trustee should "have been appointed I am, in the circumstances, willing "that the Public Trustee should be appointed trustee in place "of the plaintiff jointly with myself, and I am prepared to "take any steps necessary for effecting that appointment." The summons was heard by Simonds J., and on November 24, 1939, an order was made that the furniture belonged to the widow. The order recited an undertaking on the part of the niece to concur with the widow in appointing the Public Trustee to be a trustee of the will in place of the widow and to act jointly with the niece.

Subsequently, correspondence passed between the solicitors of the parties, and on February 7, 1940, the widow's solicitors wrote to the niece's solicitors: "As your client is "not prepared to agree that our client's retirement as a "trustee and the appointment of the Public Trustee and "your client as trustees is upon the footing that the adminis-"trative work in connection with the trust is carried out in "the Public Trustee's office and independent solicitors are "employed when occasion arises, our client . . . . is not "willing to retire or to appoint the Public Trustee."

On March 19, 1940, the niece took out a summons to which the widow was the defendant, asking that pursuant to s. 41 of the Trustee Act, 1925, the Public Trustee might be appointed to be a trustee of the will and codicil in place of the widow and to act jointly with the niece. In her affidavit the widow stated that in so far as the relief sought by her in the previous summons related to the appointment of the Public Trustee, it was sought in the mistaken belief that the independent administration of the trust would thereby be secured.

*Roger Turnbull* for the niece. The Court should displace the widow and appoint the Public Trustee by virtue of s. 41, sub-s. 1, of the Trustee Act, 1925. Under that sub-section a trustee can be removed against his will. The Court has jurisdiction to displace a trustee who, through age or infirmity has become incapable of acting or who permanently resides abroad: *In re Lemann's Trusts* (1); *In re Bignold's Settlement Trusts*. (2) In the present case, the trustee having elected to resign cannot be heard to say that she wishes to continue to act.

*Beebee* for the widow. There was no actual agreement by the widow to retire and nothing that could be regarded as consideration for such an agreement. It is sought to remove her in a hostile manner, but inasmuch as she is unwilling to retire the Court will not displace her: *In re Combs* (3); *In re Hodson's Settlement*. (4) It has always been the practice of the Court not to remove a trustee against his will. Further, in the matter of the appointment of the Public Trustee, the Court will take into consideration the views of all the beneficiaries: Annual Practice, 1940, p. 2602.

*Roger Turnbull* in reply.

BENNETT J. [having stated the facts:] The question is whether on these facts there is jurisdiction in the Court to make the order asked for by the summons.

(1) (1883) 22 Ch. D. 633.
(2) (1872) L. R. 7 Ch. 223.
(3) (1884) 51 L. T. 45.
(4) (1851) 9 Hare, 118, 121.

The language of s. 41, sub-s. 1, of the Trustee Act, 1925, on which Mr. Turnbull, for the niece, relies, is as follows: "The court may, whenever it is expedient to appoint a new "trustee or new trustees, and it is found inexpedient difficult "or impracticable so to do without the assistance of the court, "make an order appointing a new trustee or new trustees "either in substitution for or in addition to any existing "trustee or trustees, or although there is no existing trustee. "In particular and without prejudice to the generality of "the foregoing provision, the court may make an order "appointing a new trustee in substitution for a trustee who "is convicted of felony, or is a lunatic or a defective, or is a "bankrupt, or is a corporation which is in liquidation or has been "dissolved."

I do not think that it is open to doubt that on the language of the sub-section the Court has jurisdiction to displace a trustee against his will and to appoint a new trustee in substitution for him. Take the case of a trustee who is a convicted felon or a bankrupt whom the beneficiaries desire to have replaced by a new trustee. On the language of the sub-section, in my judgment, the Court has a discretion, which it can exercise, if it regards it as expedient so to do, by appointing a new trustee in place of the trustee who has been convicted of felony, or who is a bankrupt. That part of the sub-section which in terms refers to "a trustee who is convicted of felony, "or is a lunatic or a defective, or is a bankrupt" is expressly stated to be "without prejudice to the generality of the fore-"going provision." I do not doubt that the section gives the Court jurisdiction in a proper case to appoint a new trustee in place of and against the will of an existing trustee. Before exercising that jurisdiction the Court must be satisfied that it is expedient to make such an appointment and that is the real question which I have to consider in the present case.

I must not lose sight of what was said by Cotton L.J., in the case of *In re Combs.* (1) Whenever there is a dispute as to some fact, as in that case, it may be that the Court should not exercise the jurisdiction under s. 41 against the will of a trustee who wants to continue to act as such. But here there is no dispute of fact and the Court is entitled to consider whether it is expedient to make the order asked for. The only question is whether on undisputed facts a case has arisen in which it is expedient to make an appointment. Having regard to the order for which the present respondent asked in the summons which she took out on December 16, 1938, having regard to the terms of her affidavit in support of that summons, and having regard to the agreement by the present applicant to concur with the present respondent in appointing the Public Trustee to be a trustee of the will, and to the form of the order made by Simonds J. I have come to the conclusion on the undisputed facts that it is expedient to exercise the jurisdiction.

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(1) 51 L. T. 45.

The grounds on which the respondent has changed her mind are without real substance. Clearly the ground upon which she relies to explain why she has done so is that she says that there will not be independent administration of the trust by the Public Trustee unless some undertaking is given as to the solicitors to be employed in connection with it. There is no reason to suppose that if the Public Trustee be appointed there will not be independent administration of the trust.

I have come to the conclusion that it is expedient to appoint a new trustee, that it is impracticable to do so without the assistance of the Court and that there must be a substitution of the Public Trustee for the respondent.

Solicitors: *Baileys, Shaw & Gillett; C. R. Enever.*

F. C.

## *In re* GORDON (DECEASED).

## WATTS *v.* RATIONALIST PRESS ASSOCIATION, LIMITED.

BENNETT J.
1940
*June* 5.

[1939. G. 2374.]

*Will—Administration—Order of application of assets in payment of debts—Legacy subject to payment of debts—Intestacy as to residue—Debts, funeral and testamentary expenses payable out of property undisposed of—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *Sch. I., Part* 2.

A testatrix by her will gave certain specific legacies and a legacy of 50*l.* in trust thereout to pay debts, funeral and testamentary expenses, and to pay any balance remaining to a society. There was no residuary gift:—

*Held*, that there was an intestacy as to the residue and there being no direction in the will to vary the statutory order of application of assets, the debts, funeral and testamentary expenses of the testatrix were primarily payable out of property undisposed of.

Ruling of Maugham J. in *In re Kempthorne* [1930] 1 Ch. 268 applied.

SUMMONS.

The summons was taken out by Charles Albert Watts, the surviving executor of two named in the will of Kathleen Hester Gordon, spinster. The will was dated October 16, 1913, and the testatrix died on February 19, 1939, leaving estate valued about 1300*l.* The testatrix gave directions to her executors for her cremation, bequeathed a necklace and some other jewellery to a friend, Mrs. Booth, who predeceased her, and then gave a legacy of 50*l.* upon trust to pay thereout her debts, funeral and testamentary expenses, any balance remaining to be paid to the Rationalist Press Association, Ld., for the general purposes of the association.

The plaintiff took out this summons asking whether the defendant association were or were not entitled to the residuary estate of the testatrix, and if the residue was undisposed of, whether the debts, funeral and testamentary expenses of the testatrix were primarily payable out of the legacy of 50*l.* or out of the estate undisposed of by the will.

On the first question the learned judge held that the residue was undisposed of. The second question was then argued.

*E. M. Winterbotham* for the plaintiff.

*A. H. Droop* for the defendant association. There is no direction in the will varying the order of application of assets in payment of debts under Sch. I., Part 2. All that the will does is to constitute property answering to para. 3 of the Schedule.

The case is covered by the decision of Maugham J. in *In re Kempthorne.* (1) The Court of Appeal differed from the learned judge on his construction of the will in that case, holding that the gift was residuary and therefore not within paras. 3 or 4, but their reversal of his decision does not affect the principle he there stated, that a charge of debts on certain property devised or bequeathed by the will within para. 3 or para. 4 is not a provision in the will varying the order of application of assets, and therefore the debts must be paid out of property undisposed of.

Here there is no residuary gift. The testatrix charged the debts on the legacy of 50*l.*, the only property, except her jewellery, which she purported to dispose of by her will. The undisposed of estate is primarily liable to bear the debts, etc. *In re Littlewood* (2) is distinguishable on the facts; in that case it was contended that the specific bequest of farm stock charged with payment of debts, etc., showed an intention to exonerate the residue, and to vary the order in the Schedule, but here, as your Lordship has held, the testatrix has not attempted to dispose of any residue, and has not exonerated it. [He also referred to *In re Lamb* (3) and *In re Atkinson.* (4)]

*J. B. Richardson* (for *T. Cunliffe*) for a defendant representing next of kin. Paras. 3 and 4 of the Schedule do not apply to general, only to specific legacies and devises. Where the testator has given a legacy and directed that the debts

(1) [1930] 1 Ch. 268, 278.
(2) [1931] 1 Ch. 443.
(3) [1929] 1 Ch. 722.
(4) [1930] 1 Ch. 47.

should be paid out of that legacy, that is a direction in the will varying the statutory order of application of assets. And see *In re Petty* (1); *In re Atkinson.* (2) The case comes within the judgment of the Court of Appeal in *In re Kempthorne* (3): see the judgment of Lord Hanworth M.R. in that case. It is also very similar to *In re Littlewood.* (4) The defendant association are only entitled to the balance remaining after payment of the testatrix's debts, etc., out of the legacy of 50*l.*

BENNETT J. The testatrix made her will on October 16, 1913, and she died on February 19, 1939. She appointed executors; she gave directions as to her cremation and the disposal of her ashes; she gave to a Mrs. Booth (who predeceased her) some jewellery; and then she gave her executors the sum of 50*l.* in trust thereout to pay her debts and funeral and testamentary expenses, and to pay any balance remaining to the Rationalist Press Association, Ld., to be applied to the general purposes of the association. The receipt of the secretary for the time being was to be a sufficient discharge to the trustees. Those are all the dispositions of property made by the testatrix in her will. The estate of the testatrix was and is solvent.

The first question asked was whether, on the true construction of the will of the testatrix, her residuary estate was given to the Rationalist Press Association, Ld., or whether it was undisposed of. On that question I decided that the residuary estate was undisposed of and that all that the testatrix had disposed of was the balance of the 50*l.* after paying the debts and funeral and testamentary expenses.

The second question arises for decision, and it is this: "If what is given to the said defendants is only the balance "of the sum of 50*l.*, whether the testatrix's debts and funeral "and testamentary expenses are primarily payable out of "that sum or whether the same ought to be paid out of the "undisposed of estate of the testatrix." The answer to that

(1) [1929] 1 Ch. 726.
(2) [1930] 1 Ch. 47.
(3) [1930] 1 Ch. 268.
(4) [1931] 1 Ch. 443.

question depends on the true construction and effect of s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and Part II. of the First Schedule to that Act, having regard to the provisions of the will. Sub-s. 3 of s. 34 of the Administration of Estates Act, 1925, provides: "Where the estate "of a deceased person is solvent his real and personal estate "shall, subject to rules of Court and the provisions hereinafter "contained as to charges on property of the deceased, and "to the provisions, if any, contained in his will, be applicable "towards the discharge of the funeral, testamentary and "administration expenses, debts and liabilities payable thereout "in the order mentioned in Part II. of the First Schedule "to this Act."

Part II. of the First Schedule is as follows: "Order of "Application of Assets where the Estate is solvent. (1.) "Property of the deceased undisposed of by will, subject to "the retention thereout of a fund sufficient to meet any "pecuniary legacies. (2.) Property of the deceased not "specifically devised or bequeathed but included (either by a "specific or general description) in a residuary gift, subject to "the retention out of such property of a fund sufficient to meet "any pecuniary legacies, so far as not provided for as aforesaid. "(3.) Property of the deceased specifically appropriated or "devised or bequeathed (either by a specific or general "description) for the payment of debts. (4.) Property of the "deceased charged with, or devised or bequeathed (either by a "specific or general description) subject to a charge for the "payment of debts." Nos. (5.), (6.) and (7.) do not matter. No. (8.) is as follows: "The following provisions shall also "apply—(*a*) The order of application may be varied by the "will of the deceased; (*b*) This part of this Schedule does "not affect the liability of land to answer the death duty "imposed thereon in exoneration of other assets."

The second question has to be answered in the light of those statutory provisions and of the provisions which I have read contained in the testatrix's will.

It is said, and I think truly, that there has been no case which decides what the interpretation of the statutory provisions is, and what their effect is where a testator has made such a will as has to be considered in the present case. The provisions of the section have been considered in several cases to which my attention has been drawn. *In re Kempthorne* (1), decided by the Court of Appeal, was a case in which the Court of Appeal reversed the decision of Maugham J. (as he then was). But it is on the reasoning of Maugham J. in that case that Mr. Droop, who has argued on behalf of the Rationalist Press Association, has mainly relied. The testator in that case had disposed of his freehold and copyhold property in favour of his brother, and the will then provided: "As to all my leasehold "property, and all my personal estate and effects, including my "stocks and shares, and all money due to me on debentures "and mortgages, of or to which I shall be possessed or entitled "at the time of my death, subject to and after payment of my "funeral and testamentary expenses and debts and the "legacies bequeathed by this my will or any codicil hereto, "and the duty on any legacies bequeathed free of duty, the "same shall be divided into seven equal parts, and I bequeath "the same as follows." As regards three equal seventh parts of the property so given, there was a lapse owing to the death of two of the legatees in the testator's lifetime, and the question which arose was whether the testator's debts and funeral and testamentary expenses should be paid out of the lapsed shares in exoneration of the shares which had not lapsed. Maugham J. came to the conclusion that the debts and funeral and testamentary expenses ought to be paid out of the shares which had lapsed in exoneration of the shares which had not lapsed, and the ground on which he decided the case is to be found at p. 278 of the report. He read paras. 1 and 2 of the Schedule, and proceeded as follows (2): "Then come two "further paragraphs, which I think are somewhat difficult to "understand, in relation to the subject-matter. The third "item of property is 'Property of the deceased specifically "'appropriated or devised or bequeathed (either by a specific "'or general description) for the payment of debts.' The "fourth is 'Property of the deceased charged with, or devised

(1) [1930] 1 Ch. 268. (2) Ibid. 278.

"' or bequeathed (either by a specific or general description) "' subject to a charge for the payment of debts.' Now in "both of those cases it is to be noticed that the Legislature is "assuming that the testator by his will has specifically "appropriated in one case, or devised or bequeathed in the "other, property for the payment of debts; or that he has "charged with payment of debts specific property, or some "property, under a general description, or devised or "bequeathed property subject to a charge for payment of "debts, and I cannot help concluding that those two "paragraphs mean that the fact that the testator has done "one of those things is not per se to constitute, to use the words "of section 34, sub-s. 3, a provision in the will which operates "to alter the order of application which is specified in Part II. "of the Schedule. In the present case there is, I think, an "indication that the leasehold property and the personal "estate and effects of the testator, including his stocks and "shares, &c., are being bequeathed subject to a charge for "payment of debts; for a gift of property subject to payment "of debts is a gift of property subject to a charge for the "payment of debts. Accordingly this property of the "deceased is, I think, being subjected to a charge for payment "of debts within the meaning of the phrase as contained in "para. 4 of Part II., and I conceive that that is not to "affect the circumstance that under para. 1 of Part II. "the property of the deceased undisposed of by will is primarily "to be applied in payment of these particular liabilities, "funeral and testamentary expenses and debts."

That was the ground on which Maugham J. based his decision. The case went to the Court of Appeal, where his decision was reversed. (1) The ground on which it was reversed clearly appears from the judgment of Lawrence L.J. who said (2): " I agree with Maugham J. that the introduction "into the Schedule of the third and fourth items of property "(to be applied in that order) might in some cases create "a difficulty in determining the true effect of the words "' subject to the provisions, if any, contained in his will,' in

(1) [1930] 1 Ch. 279. (2) Ibid. 299, 301.

"section 34, sub-s. 3, as an express provision contained in a will "that property should be appropriated or be subjected to a charge "for the payment of debts would, prima facie, appear to "indicate an intention inconsistent with the order of application "contained in the Schedule which places property undisposed "of and property included in a residuary gift as the first and "second items to be resorted to for the payment of expenses "and debts. I do not, however, agree with the learned judge "that this difficulty arises in the present case; or that in the "present will any property is bequeathed subject to a charge "for the payment of debts within the meaning of para. 4 "of the Schedule." On that ground Lawrence L.J. came to the conclusion that the foundation of Maugham J.'s judgment was incorrect, there being no property in the will bequeathed subject to a charge for payment of debts within the meaning of para. 4 of the Schedule. The judgment of Russell L.J. (1) is to the same effect.

There is not a suggestion, nor a hint of a suggestion, in any of the judgments of the members of the Court of Appeal in that case that they would have disagreed with Maugham J. if they had been in agreement with him as to the foundation of his conclusion, the foundation being that the testator had either specifically appropriated or devised or bequeathed property for the payment of debts or had charged property with or devised or bequeathed property subject to a charge for the payment of debts.

In the present case it is clear that the testatrix has either bequeathed property for the payment of her debts or has bequeathed property charged with the payment of her debts. She has made no other disposition of her property. The facts of the case plainly fall within the reasoning of Maugham J., with which, if I may respectfully say so, I entirely agree. Where a solvent testator has made by his will a disposition of property which falls either within para. 3 of the Schedule or within para. 4, and has made no other disposition of his property and has not otherwise indicated his intentions, there seem to me to be no grounds for a conclusion that such

(1) [1930] 1 Ch. 301.

BENNETT J.

1940

GORDON, *In re.* WATTS *v.* RATIONALIST PRESS ASSOCIATION, LD.

a testator has intended to vary or interfere with or alter the order in which the statute has said that assets are to be applied for the payment of debts and funeral and testamentary expenses.

As I have said, this testatrix has either made a provision in accordance with para. 3 or in accordance with para. 4 of the Schedule, I do not think it matters which. My own view is that she made a bequest which comes within the terms of para. 4; otherwise she has died completely intestate without having made any disposition whatever of the property of which she died possessed. I can see nothing in her dispositions which alters the order in which the statute says that the assets are to be applied. The result is that, in my judgment, the answer to the second question is that the testatrix's debts and funeral and testamentary expenses ought to be paid out of the undisposed of estate of the testatrix.

Solicitors: *Ellis, Munday & Clarke; Ruston, Clark & Ruston.*

H. L. L.

# *In re* LONDON HOUSING SOCIETY, LIMITED'S, TRUST DEEDS.

FARWELL J.
1940
June 12.

## MOREland *v.* WOODWARD.

[1940. L. 1324.]

*Industrial society—Pension fund for benefit of staff—Trust deed—Conversion of society into limited company—Staff transferred to company—Trusts of deed unaffected by conversion—Industrial and Provident Societies Act,* 1893 (56 *&* 57 *Vict. c.* 39), *s.* 54.

A society registered under the Industrial and Provident Societies Act, 1893, by a trust deed executed in 1935 established a pension fund for the benefit of its staff and transferred moneys for that purpose to trustees and declared trusts thereof. In 1939 in pursuance of s. 54 of the Act of 1893 the society was converted into a limited company. A company was registered which took over all its business and staff, and the registration of the society under the Industrial and Provident Societies Acts was cancelled :—

*Held*, that the trustees of the trust deed held the funds vested in them upon the same trusts, and for the same class of persons, now the staff of the company, as before.

SUMMONS.

The London Housing Society, was registered in 1910 under the Industrial and Provident Societies Act, 1893. In 1935 the society created a pension fund by a trust deed, and transferred to the trustees thereof moneys which it had set aside for that purpose annually since 1926. The deed declared trusts for the benefit of the staff of the society, present and future. The material provisions of the deed are set out in the judgment.

In December, 1939, the society was converted into a limited company under the Companies Act, 1929, in pursuance of the power contained in s. 54 of the Industrial and Provident Societies Act. The summons was taken out by the trustees of the trust deed of 1935, asking whether in the events which had happened the funds subject to the deed were still held upon the same trusts for the same class of persons as before the conversion.

FARWELL J.
1940
London Housing Society, Ld.'s, Trust Deeds, *In re.*
Moreland *v.* Woodward.

*Philip J. Sykes* for the plaintiffs. The society has been converted into a limited company under the powers of s. 54 of the Industrial and Provident Societies Act, 1893, in consequence of recent legislation. The objects of the company are identically the same as the objects of the society. The staff of the society are now the staff of the company. It is submitted that the funds vested in the trustees of the deeds are now held upon the same trusts as before for the benefit of the same persons, now the employees of the company.

He referred to *Blythe* v. *Birtley* (1) and *In re Blackburn Philanthropic Assurance Co., Ld.* (2)

*J. G. Mavrogordato* for a respondent representing the company's employees adopted the plaintiffs' argument.

FARWELL J. This summons raises a question as to the effect on a trust fund of the conversion of an industrial insurance society into a limited company under the power which is contained in s. 54 of the Industrial and Provident Societies Act, 1893.

The society in question is the London Housing Society, Ld., and it was registered under the Industrial and Provident Societies Act, 1893, on June 7, 1910. By a trust deed of April 12, 1935, a fund in the nature of a pension fund was established. That deed of 1935, which was made between the London Housing Society of the one part and certain trustees of the other part, recites, first, that " The society is a society "registered under the Industrial and Provident Societies "Act, 1893, and under rule 21 (as amended) of its rules has "power to apply the net profits of its business after making "thereout the payments therein mentioned in establishing "a staff pension fund provided that the contribution of the "society to such fund shall not exceed the sum of 2500*l.* in any "year." It then recites: " Since the year 1926 the society "has set aside annually out of its profits certain sums for the "purposes of such a fund, and the investments and cash "specified in the schedule hereto which have been transferred "by the society into the names of the trustees previously to

(1) [1910] 1 Ch. 228.

(2) [1914] 2 Ch. 430.

"the execution of these presents, represent the unexpended "balance of the sums so set aside as aforesaid and the "accumulations thereof." It states that the society is desirous of declaring the trusts on which the investments and cash so transferred shall be held by the trustees. Clause 1 provides: "In this deed where the context so requires or admits the "expression 'the trustees' shall include the trustees for the "time being of these presents and 'the fund' shall mean the "staff pension fund of the society and shall include all moneys "from time to time held by or on account of the trustees in pursuance of these presents together with the income thereof and "the investments for the time being representing the same."

Clause 2 provides: "The fund shall consist, in the first "instance, of the investments and cash specified in the "schedule hereto, and there shall be added to it all contributions made by the society under the hereinbefore recited "power, or any other power in its rules and all contributions "or donations thereto made by any other person or persons "and any sums so contributed shall be paid forthwith to the "trustees upon the trusts hereof." Clause 3 is an investment clause providing for the investment money in the hands of the trustees. Clause 4 provides: "The fund is to be regarded "as primarily established for the benefit of past, present and "future employees of the society whose character and length "of service may in the judgment of the trustees entitle them "to a claim on it, and, secondly, for the purpose of assisting "survivors who may have been dependent on deceased "employees and whose circumstances may necessitate some "help." By clause 5: "The fund shall be applied by the "trustees in making such payments whether out of income or "capital, to or for the benefit of past, present or future "employees of the society and their dependants as the trustees "shall in their unfettered discretion think fit, but without "prejudice to such discretion it is not contemplated that "except in cases of ill-health or other special circumstances "any payment shall be made out of the fund to or for the "benefit of an employee who is not sixty years of age and has "not completed ten years' service with the society."

Clause 11 provides: "If the society shall at any time "give to the trustees notice in writing that the society does "not intend to make any further contributions to the fund "or an order shall be made or any effective resolution passed "for the dissolution of the society, the fund shall be realized "and shall be distributed amongst such of the then employees "of the society and such past employees and such dependants "of past employees and in such proportions as shall be "determined to be just and equitable by an arbitrator to be "appointed by a unanimous resolution of the trustees, and if "such appointment is not made within three months after "the giving of such notice or the making or passing of such "order or resolution as aforesaid, then the majority of the "trustees may request the President for the time being of "Law Society to appoint him accordingly." Clause 12 provides that the arbitrator's determination shall be absolute and final. That trust deed having been entered into, there was in the year 1937 a supplemental deed dated April 1, 1937, to which I do not think it necessary to refer in any detail at all. The purpose of the deed was to prevent questions arising whether the provisions of clause 11 of the principal trust deed might be bad as offending against the rule against perpetuities, and it was desired to amend the principal trust deed in such a way as to prevent that possibility ever arising.

On October 25 and November 15, 1939, the society passed a resolution that it be converted into a limited liability company, and on December 30, 1939, a company limited by shares was registered. That company now carries on business in the place of, and takes the position of, the original London Housing Society. The conversion of the society into a limited company is expressly authorized by s. 54 of the Industrial and Provident Societies Act, 1893, which section provides: "(1.) A registered society may by special resolution determine "to convert itself into a company under the Companies Acts, "or to amalgamate with or transfer its engagements to any "such company. (2.) If a special resolution for converting "a registered society into a company contains the particulars "by the Companies Acts required to be contained in the "memorandum of association of a company, and a copy thereof has been registered at the central office, a copy of such resolution under the seal or stamp of the central office shall have the same effect as a memorandum of association duly signed and attested under the said Act. (3.) If a registered society is registered as, or amalgamates with, or transfers all its engagements to, a company, the registry of such society under this Act shall thereupon become void, and the same shall be cancelled by the Chief Registrar or by the Assistant Registrar for Scotland or Ireland under his direction; but the registration of a society as a company shall not affect any right or claim for the time being subsisting against such society, or any penalty for the time being incurred by such society; and, for the purpose of enforcing any such right, claim, or penalty, the society may be sued and proceeded against in the same manner as if it had not become registered as a company; and every such right or claim, or the liability to such penalty, shall have priority, as against the property of such company, over all other rights or claims against or liabilities of such company."

I think that it is clear from that section that an industrial society is entitled—in fact, it says so in terms—to convert itself into a company under the Companies Act, and if it takes the necessary steps to effect that object, the position then is that the name of the society, as an industrial society, is removed from the register and thereby ceases to be a registered society. But the latter part of sub-s. 3 quite clearly recognizes that the society, although no longer functioning as a registered provident society, is still something which is in existence, because there is the express provision that the registration of the company shall not affect any rights or claims against the society. That is for the purpose of enabling people to recover moneys due to them, or penalties which have been incurred by the society. The Act provides that such persons are to have the right to sue for and recover moneys due to them, or penalties, notwithstanding that the society has been changed from a registered society into a company.

The only other section of the Act to which I need refer is

s. 58, which is in a very different form from and has no express relation to s. 54. It provides the ways in which a registered society may be dissolved; first, by an order to wind up or a resolution for winding up; or secondly, by the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution. So far as the dissolution of the society is concerned, it is a totally different process which requires different machinery to bring about from the conversion of a registered society into a company, which is provided for by s. 54.

In these circumstances the trustees of the trust deed feel a difficulty. Under that deed they hold the trust funds on trust to apply them as provided by the deed itself for the benefit of certain persons who are or were employees of the registered society. As the position is at this moment, the employees, who were intended to be the beneficiaries under the trust deed, are not employees of the registered society at all; they are employees of the company into which the registered society has been converted, and, not unnaturally, the trustees feel apprehensive if and when they are asked, or when they desire, to pay pensions or make other applications of the fund to persons who were employees of the society but are not so employed any longer. The difficulty is an acute one because, as I understand it, there are certain pensions which have been paid for some time to persons who were in need, being employees or ex-employees of the society, and it would be disastrous in some cases if those payments had to be discontinued. On the other hand, the trustees are, of course, most anxious to do nothing which would be a breach of trust, and they desire to know how they ought to act in the circumstances.

In my judgment, the position comes to this. Nothing has been done which brings into play, according to its terms, the provisions of clause 11 of the trust deed. There has been no notice given by the society such as is contemplated in the first part of the clause, nor has there been an order or effective resolution passed for the dissolution of the society. What has been done is something which is not under s. 58, the dissolution section of the Act, but under s. 54, which is not a dissolution section at all, but is the section which enables a registered society to go through a form of conversion and come out at the other end, after the operation is over, a limited company. But the liabilities which the registered society may have incurred before the operation takes place are to be in no way prejudiced by that change. The society is to remain liable for those liabilities, and such claims are to have priority against the property of the company over all other rights or claims against or liabilities of the company. It is quite clear, therefore, that the Legislature, in passing this legislation providing for a conversion in this way, was not treating the registered society as having determined altogether for all purposes, but was treating the act which was done as being in the true sense of the word a conversion and not a dissolution. In my judgment there is nothing in the trust deed itself which brings to an end the trusts provided by that deed, and the trustees hold the funds, so far as the deed itself is concerned, on trust for the employees and ex-employees of the society. What are the trustees to do now that the society has ceased as a society and there has come into life a company which is the society in another form? In my judgment the answer must be that the trustees hold the trust funds in their hands on exactly the same trusts as they held them before. The beneficiaries, the persons who are entitled to the benefit of the fund, or may be benefited by the fund, are precisely the same persons, I do not mean individually, but they are precisely the same class of persons as the class of persons before—that is to say, persons who were employees or ex-employees of the society and are now employees or ex-employees of the society in its new form as a limited company. It is no doubt true to say that the registered society and the limited company are, in one sense of the word, separate legal entities, but I think that that fact does not really alter the position that, although in law they may be separate entities, they are in substance and in truth exactly the same thing with a different structure and a different machinery. I think that that is what Buckley L.J. is referring to at the end of his judgment in *Blythe* v. *Birtley*. (1) "Sect. 71 simply meant to provide "that they might change their legal structure, but the new "entity existing under the new legal structure was to be a "reproduction of the previous entity with different machinery "for its government." I think that what Buckley L.J. is there saying is that, although in law there may have to be recognized the fact that strictly they were two entities, the new entity under the new legal structure is a reproduction of that which existed before, namely, the society.

In my judgment the only practical way of dealing with a question of this sort, having regard to the terms of the Act and the express provision in the Act for enabling a registered society to convert itself into a limited company, is to treat for this purpose the two things, the registered society and the limited company, as the same thing in different costume. The registered society, the employees of the society, and the objects of the trusts, are, as it were, carried on, and continued in the same form as before except that the entity which employs them has a different name and a different structure from that which the society had: But in truth and in substance the society and the company are the same thing and, therefore, the trustees, if they continue to apply the trust funds for the benefit of the persons for whom they would have employed them had the registered society remained, will not be committing any breach of trust. They will in fact be carrying out the purpose of the trust and the reason for which it was established.

In my judgment, therefore, the trustees remain in exactly the same position as they were in before, with the same duties, the same obligations, and the same class of beneficiaries, although they may not be the same beneficiaries as were existing before the change was made in 1939.

Solicitors: *Rooks, Wales, Godwin & Galsworthy.*

(1) [1910] 1 Ch. 228, 238.

H. L. L.

## EICHENGRUEN *v.* MOND.

C. A.

1940

*June* 3.

[1938. E. 1555.]

*Practice—Enemy alien—Issue of writ before war, against English company and certain shareholders—Application of defendants to have statement of claim struck out and action dismissed—Notice of motion served on plaintiff's solicitors on the record—Jurisdiction of the Court to grant application.*

A writ in an action was issued in December, 1938, by a German subject, resident in Berlin, the defendants being an English company and certain of its English shareholders. The writ was issued by a firm of solicitors, and that firm remained the solicitors for the plaintiff on the record. A statement of claim was delivered and a defence entered. The action related to events that occurred in 1915.

On the outbreak of war the plaintiff became an enemy alien. Later the defendants applied to have the statement of claim struck out as disclosing no cause of action, and to have the action dismissed as frivolous and vexatious. That application was served on the plaintiff's solicitors on the record:—

*Held*, reversing Simonds J., that the statement of claim disclosed no cause of action and that the action was frivolous and vexatious, and that the defendants, having acted in accordance with the rules and procedure of the Courts, ought to be granted the order they asked for, notwithstanding the fact that the plaintiff was an enemy alien.

Appeal from Simonds J.

The writ in this action was issued on December 2, 1938, by the plaintiff, a German national resident in Berlin. It was issued by a firm of solicitors, who remained the solicitors for the plaintiff on the record. The statement of claim was delivered on January 20, 1939. The action related to events that occurred in 1915. In that year the defendant company issued new shares to its shareholders, other than the plaintiff, who was then an enemy alien. By his statement of claim the plaintiff claimed that the appellant and the first respondent, to whom shares had been issued, had, as a result of that transaction, become trustees for him of his due proportion of the shares issued to them, and as against the company, he claimed that as no notice of the issue was served upon him, the issue was void.

On the outbreak of war in September, 1939, the plaintiff again became an enemy alien. The defendants then applied to have the statement of claim struck out as disclosing no cause of action, and to have the action dismissed as frivolous and vexatious. That application was served on the plaintiff's solicitors on the record. Simonds J. refused the application.

The defendant, Dr. Mond, appealed. The appeal was heard on June 3, 1940.

*W. P. Spens K.C.* and *Hon. H. Fletcher Moulton* for the appellant. There is no evidence that the plaintiff, an enemy alien, who has always been resident in Berlin, has ever been served with the notice of motion, and the question is whether the Court ought to or can exercise its jurisdiction in the circumstances. If a plaintiff disappeared and his solicitors on the record could not communicate with him, that would not prevent an order being made that his statement of claim should be struck out and that the action should be dismissed. The solicitor on the record remains the agent of the principal until the principal substitutes another solicitor on the record (see note "Solicitor on Record" to Order LXVII., r. 2). All the rules applying in this case that are set out in Orders IV. and XII. have been complied with by the solicitors for the appellant. Order XXV., r. 4, gives the Court jurisdiction to strike out any pleading.

If a foreign litigant brings an action in this country he comes within the rules and procedure of the English Courts, and if he does not prosecute his claim, no matter what the reason, a defendant can move to have the claim struck out. An action is not suspended because one of the parties is an enemy alien: *Robinson & Co.* v. *Continental Insurance Company of Mannheim* (1), where no question was raised that solicitor and counsel for an enemy alien could not appear. The principle laid down in *In re Merten's Patents* (2) ought to be followed here.

*J. F. Bowyer* (*for E. Blanshard Stamp*, on war service) for the respondents.

SIR WILFRID GREENE M.R. On December 2, 1938, a writ was issued by the plaintiff in the action, Arthur Eichengruen, who resides in Berlin. The writ was issued by a firm of solicitors, and that firm remains the solicitors for the plaintiff on the record.

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(1) [1915] 1 K. B. 155. (2) [1915] 1 K. B. 857, 861 et seq.

The statement of claim was delivered on January 20, 1939, and it is a remarkable document. It claims relief in connection with certain transactions which took place as long ago as the year 1915, and, complaining, as he does, of those transactions, it was essential for the plaintiff to construct a cause of action, if he could, which would prevent the Statute of Limitations being set up as a defence. It appears from the statement of claim that the plaintiff and certain others, including the first defendant, Dr. Mond, and the second defendant, Mr. Barr, were in the year 1915 shareholders in the defendant company, Cellon (Holding) Company, Ld. The statement of claim refers to clause 5 (*a*) of the company's memorandum of association, under which the holders of shares in the original capital were to be entitled to take up any shares created by an increase of capital and such holders were to receive notice of every determination to issue further capital and were to have at least twenty-one days within which to subscribe for their proportion.

In the month of September, 1915, the defendant company increased its capital and resolutions were passed, pursuant to which 2500 shares, forming part of the increased capital, were allotted to four shareholders, the defendant Dr. Mond, the defendant Mr. Barr, and two others. No shares were allotted to the plaintiff, for the very good reason that at that time he was an enemy alien and no shares could lawfully be allotted to him. If it had not been for that circumstance and if the provisions of the memorandum of association had been complied with, the plaintiff would have been entitled, when the new issue was made, to receive or to be offered an allotment which he could accept or not, as he pleased, of his appropriate proportion of the new shares which were being issued. No notice apparently, so he alleges, was given to him of the intention to issue fresh capital and he had no opportunity of subscribing.

In the month of December, 1938, he launched this action, complaining of what happened in 1915 and asserting a right in himself in respect of that issue of shares. He asked in the first place for a declaration against Dr. Mond and Mr. Barr to the effect that they were trustees for the plaintiff of the shares allotted to them in September, 1915, to the extent of the proportion which, under the memorandum, he would have been entitled to receive. Alternatively, he asked for a declaration that those defendants became trustees by virtue of a document mentioned in the statement of claim, to which I shall refer in a moment. Alternatively, as against the third defendant, that is the company, he asked for a declaration that the purported issue of those 2500 shares was wholly void for want of compliance with clause 5 (*a*) of the memorandum; and, as against the first and second defendants, he claimed damages for breach of trust.

I will look, in the first place, at the first declaration claimed. It is based upon the hypothesis that shares issued to the first two defendants having been issued contrary to the terms of the memorandum of association and in disregard, as it is said, of the plaintiff's rights, that issue had the effect of constituting between the plaintiff and those two defendants as allottees of the shares the relationship of cestui que trust and trustee. There is, of course, no question of any express trust and the claim is based upon the theory that the relationship of the parties and the other relevant circumstances of the case are sufficient to raise an obligation of trusteeship in those defendants in respect of those shares.

In my opinion, that is a theory for which there is no tittle of support. The facts alleged (I will assume in the plaintiff's favour) show that the company in issuing those shares issued them in a way which the memorandum of association did not permit. I will assume in the plaintiff's favour that the directors who were party to that issue in some way failed to perform their duty to the company. I will assume in the plaintiff's favour that the allottees of those shares on that allotment received more shares than they were entitled to under the memorandum of association. But those circumstances are not sufficient to constitute the relationship of trustee and cestui que trust. There is no implied trust obligation to be discovered in facts of that sort. Under the assumption I have made it may be—I express no opinion upon it—that the plaintiff may have had a claim ex contractu against the company; conceivably (again, I say nothing about it) he might have had some claim ex contractu against his fellow shareholders who received the shares; but any such claim would, of course, at this date have been perfectly hopeless, because it would have been a claim in contract, and time would have been a complete answer to it. The attempt to construct a trust obligation out of those facts, without which the plaintiff would be hopelessly barred, is in my opinion, one which fails completely. That deals with the first declaration.

The second declaration is based upon a document dated November 29, 1915, referred to in para. 7 of the statement of claim. It is stated to have been a document signed by the four allottees of the 2500 shares. It recited that they were the directors of the defendant company and by it they agreed to hold the shares and dividends upon trust to be dealt with as the majority of them or the survivors or the majority of the survivors should from time to time determine, each of them admitting that they had not nor were or should have been entitled to any other or further beneficial interest (if any) in such shares than as might be determined by them and in the manner and at the time set out in the document.

That document quite clearly confers no rights whatever upon the plaintiff. He is not mentioned in it and the trust which is constituted by that document is a trust in which he has no part or concern. Accordingly, the second alternative claim is, in my opinion, equally incapable of support.

The third claim is a claim expressed to be an alternative claim as against the defendant company. It is a claim, as I have said, that the issue of 2500 shares was wholly void and it is to be observed that no substantive relief is claimed on the basis of that declaration, but, in any event, it is not a declaration claimed against the first two defendants at all.

The fourth claim, which is one for damages for breach of trust, cannot be supported in view of what I have said with regard to the declarations.

The position, therefore, in my opinion, is that this statement of claim discloses, as against the present appellant Dr. Mond, no cause of action. I go further and say that, in my opinion, having regard to the time which has elapsed since the matters complained of, this action is not one which can be treated as a serious action and, in my judgment, it is a frivolous and vexatious one. On the facts as I have at present outlined them, the appellant Dr. Mond would in the circumstances of this case be, in my judgment, unquestionably entitled to ask this Court for an order striking out the statement of claim as against him and dismissing the action as against him.

The notice of motion asking for that relief was duly served on the plaintiff's solicitors on the record. The present notice of appeal has been duly served on those solicitors and, but for the circumstances which I am about to mention, there can be no question that, so far as procedure is concerned, the matter has been conducted with perfect regularity and the circumstance that the plaintiff did not appear in Court would be no reason for refusing the order to which the appellant is otherwise entitled.

The circumstance which might appear at first sight to raise some doubt—and, indeed, it was one which had to be carefully considered by the Court—is the circumstance that the plaintiff became an enemy alien on the outbreak of the present war and he so remains. Before the present war broke out his writ had been issued and his statement of claim delivered and defences to the action had been delivered, and, further, he had made certain admissions of fact. The outbreak of war has not had the result of removing from the record the name of the solicitors who were acting for the plaintiff, and, indeed, according to the rules and practice of the Court, a solicitor who is once on the record remains on the record notwithstanding that his retainer may be revoked. The only way by which his name can be got off the record is by appointing another solicitor in his place and that solicitor being entered upon the record as the solicitor for the party in person. Therefore, according to the rules, the service upon that firm of solicitors was a perfectly good and effective service. Ought the circumstance that the present plaintiff is an alien enemy to affect the right of the appellant, who is a British subject, to obtain from this Court the relief to which as matters stand he is, in my opinion, quite clearly entitled? In other words, is he to be left under the disadvantage of having this action hanging over him for an indefinite period merely because the plaintiff is an enemy alien? Putting it in still another way: Is the plaintiff, because he is an enemy alien, to have the advantage, for what it is worth, of holding over the head of a British subject indefinitely an action, and doing so on the ground that, because he is an enemy alien, the ordinary procedure of the Courts does not apply to him or ought not to be allowed to apply to him so that the service of the notice of motion upon him should be treated as in some way defective or some discretion of the Court ought to be exercised in his favour? I can see no ground why such a privilege should be accorded to an enemy alien and why such a disadvantage should be imposed upon a British subject. The rules have been strictly complied with and the circumstance that the plaintiff's solicitors on the record have not communicated with their client and might well have difficulties in communicating with him does not, upon the facts of this case, in my view, justify the Court in withholding from the appellant the relief to which he is entitled or in postponing decision upon the application until such steps as might be possible to communicate with the plaintiff had been taken.

I make that last observation for this reason. It must not be supposed that, because an enemy alien plaintiff finds himself in a situation in which his statement of claim is attacked, as it is attacked in this case, the circumstance that he is an enemy alien necessarily in every case would mean that the Court would make the order asked for without some further inquiries as to the possibility of communicating with him. The solicitor on the record must not take it that he has performed his duty to his client by doing nothing in the matter. He might be able to take some steps himself or he might leave the matter to the Court to give such directions to him with a view to communicating, if possible, with his client as the necessity of the case would appear to dictate in the interests of justice.

No such steps, in my view, ought to be taken in the present case for the reason that the action upon its face is quite unsustainable, and for the further reason that it is a hopelessly stale demand, dealing, as it does, with matters which the plaintiff could have litigated nearly twenty years ago, if he had been so disposed.

In those circumstances, the Court ought not, in my opinion, to delay giving the appellant the relief to which he is entitled in order that some communication should be attempted with the enemy plaintiff.

For those reasons, in my judgment, the appeal is entitled to succeed. The learned judge felt apparently some hesitation as to whether in any case an order should be made in view of the fact that the plaintiff was an enemy alien, but proceeded on the basis that the order could and would be made. Notwithstanding that circumstance, he thought that there was sufficient in the statement of claim to justify some consideration at the trial that the summary step of striking it out ought not to be taken. With all respect to him, I cannot find anything in the statement of claim which would justify a refusal to make the order. On the facts of this particular case I have entertained no doubt that the order ought to be made, notwithstanding the enemy character of the plaintiff.

The appeal is by Dr. Mond alone, although the notice of motion on the face of it purported to be a notice of motion on behalf of all the defendants. They have, we are told, been represented by different solicitors, Dr. Mond by one firm of solicitors and Mr. Barr and the company by another firm of solicitors. The position of Mr. Barr and the company is one which is not affected, save as a matter of authority on the questions of law we have had to discuss, by the present order, which is an order affecting Dr. Mond alone. The order will be that the statement of claim as against Dr. Mond be struck out and the action as against him dismissed with costs.

SCOTT L.J. I agree.

CLAUSON L.J. I agree.

*Appeal allowed.*

Solicitors: *H. C. Morris, Woolsey, Morris & Kennedy; Brash Wheeler, Chambers, Davies & Co.*

P. J. B.

C. A.
1940
May 21, 22, 23; June 27.

## SCOTT *v.* FRANK F. SCOTT (LONDON), LIMITED AND OTHERS.

[1939. S. 823.]

*Company—Articles of Association—Executor of deceased member—Right to registration—Rectification—Jurisdiction—Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 14, 15, 16, 17—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 12, 13, 15, 20, 381.

When the executor of a deceased member of a company has the legal right to the shares of which the deceased was the registered holder, the executor is entitled, in the absence of any power of veto conferred on the company by its articles of association, to have his name entered on the register if he so desires, as a right ancillary to his legal title to the shares.

*Buchan's* case (1879) 4 App. Cas. 549, and *Heward* v. *Wheatley* (1853) 3 D. M. & G. 628, 646 applied.

The Court has no jurisdiction to rectify the articles of association of a company even if those articles do not accord with what is proved to have been the concurrent intention of the signatories at the moment of signature.

*Evans* v. *Chapman* [1902] W. N. 78; 86 L. T. 381 approved:—

So *held* by the Court of Appeal (Scott, Clauson and Luxmoore L.JJ.) affirming the decision of Bennett J. (ante, p. 217), on the question of rectification.

APPEAL and cross-appeal from Bennett J. (1)

A company, Frank F. Scott (London), Ld., was incorporated on October 12, 1926, as a private company, and its incorporation was effected under the Companies Acts, 1908 1917. It had a share capital of 10,500*l.*, divided in 10,200 preference shares of 1*l.* each and 300 ordinary shares of 1*l.* each. The company was formed to take over a business of shipping butchers carried on in partnership in London by three brothers, Stuart Arthur Scott, Reginald Scott, and Frank Stanley Scott. Frank Stanley Scott and Reginald Scott were also interested in a similar kind of business carried on in Liverpool, where they were in business, the business which the defendant company was formed to carry on having been previously managed by the defendant, Stuart Arthur Scott. The company adopted as its articles of association

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(1) Ante, p. 217.

Table A in the First Schedule to the Companies (Consolidation) Act, 1908, with certain modifications, included in which was the exclusion of clause 22, and the whole of the share capital was issued to the three brothers in equal shares.

The control of the company was in the hands of the ordinary shareholders, the preference shareholders only having a right of voting at a general meeting upon such questions as reduction of capital, winding up of the company, sanctioning a sale of the undertaking or altering the regulations of the company so as to affect directly the rights of the preference shareholders.

Frank Stanley Scott died on September 10, 1937, and his widow, who was the sole executrix of his will, became entitled thereunder to all his preference and ordinary shares in the company. No question arose in regard to the preference shares, but she claimed the right to be placed on the register of members in respect of his ordinary shares. The two surviving brothers, however, claimed that under the articles of association, she was bound to offer to them her testator's ordinary shares and that they had the right to acquire them at par. She therefore commenced an action against the company and the two surviving brothers, in which she sought a declaration that she was entitled to have her name entered on the register of members of the company as the holder of 100 ordinary shares. The defendants in their counter-claim sought a declaration that, upon the true construction of the articles of association, the two brothers had the right to acquire from the plaintiff these 100 ordinary shares at par and, if the construction they asked the Court to put on the articles of association should not be the correct construction, then they sought rectification of the articles so as to give them the right to acquire these shares from the plaintiff at par.

Bennett J. held on the construction of the articles that the plaintiff was not entitled to the declaration which she sought, and that her action therefore failed. With regard to the counter-claim he held that the two surviving brothers were, on the construction of the articles, entitled to a declaration that they had the right to acquire the 100 ordinary shares at par. He also dealt with the question of the jurisdiction of the Court to rectify the articles of association, holding that the Court had no jurisdiction to rectify the articles, even though the articles did not accord with the proved intention of the three brothers, who were the signatories, that the ordinary shares held by a deceased member should be offered at par to the principal shareholders.

The plaintiff appealed, and there was a cross-appeal by the defendant, Reginald Scott.

The appeal and cross-appeal were heard on May 21, 22 and 23, and judgment given on June 27, 1940.

In the Court below the only part of the decision reported was on the question of jurisdiction. On appeal the Court allowed the appeal and dismissed the counter-claim, but the only questions that require to be reported are (1.) whether having regard to the finding of Bennett J. that the articles of association were intended by the signatories to provide that the ordinary shares of a deceased member of the company should be offered to the principal shareholders at par, there was jurisdiction to rectify the articles of association; and, if not (2.) whether the executrix of the deceased member had a right, in the absence of any provision to the contrary in the articles of association, to be placed on the register in respect of her testator's shares?

*W. P. Spens K.C.* and *Maurice Berkeley* for the appellant. If as already argued there is nothing in the articles of association of the company to entitle the surviving brothers of her testator to acquire his ordinary shares at par, it follows that the appellant has a right to be registered as a member of the company is respect of her husband's shares. It is true that there is nothing in the articles expressly providing for this, seeing that clause 22 of Table A is expressly excluded, but it is an inherent right of an executor in the absence of words in the articles of association expressly taking it away.

*Charles Harman K.C.* and *E. M. Winterbotham* for the respondents. There is nothing in the articles of association giving the appellant the right to registration and therefore she cannot require her name to be placed on the register.

[Clauson L.J. An executor has the right to have his name put on the register of a company in respect of his testator's shares, unless there is something in the articles to take that right away. It is a right of property.]

It is submitted that it is not so. The Companies Act, 1929, s. 64, provides that a transfer of shares of a deceased member of a company by his executor is as valid as if he were a member of the company. To transfer the shares is the course the executor has to adopt unless there is an express provision in the articles conferring on him the right to registration.

*W. P. Spens K.C.* in reply. As a company can recognize no one but the personal representative of a deceased member as the owner of his shares, the personal representative must have a right to registration in respect of the deceased's shares, unless a right to refuse him registration is to be found in the articles of association: *Buchan's* case (1); *Heward* v. *Wheatley* (2); see also *In re Agriculturist Cattle Insurance Co. Baird's* case. (3) *Heward* v. *Wheatley* (2) is exactly applicable here apart from the fact that the decision was under an old Act of Geo. 4. It is therefore unnecessary to imply a right to registration as was done in *In re Frank F. Scott* (*Liverpool*), *Ld.* (4), a case directly applicable here.

The question arising on the cross-appeal, whether the articles of association ought to be rectified, was then argued on the assumption that the Court took the view that there was no obligation on the executrix of Frank Stanley Scott to transfer his shares to his surviving brothers who with the deceased were the only shareholders of the company at the time of his death.

*Charles Harman K.C.* and *E. M. Winterbotham* for the respondent on his cross-appeal. As between the three brothers rectification would be ordered because the articles of association as signed by them did not, on the view taken by the Court, carry out their intention. That is still so, although one brother is dead, for his executrix is only entitled to his shares qua executrix and holds on the same footing as her testator.

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(1) 4 App. Cas. 549.

(2) 3 D. M. & G. 628, 646.

(3) (1870) L. R. 5 Ch. 725, 735.

(4) (1930) Unrep.

[Clauson L.J. The company has come into existence with no such intention and it is bound by the articles. What ground is there for rectification as against it?]

The plaintiff's claim is unconscionable, and it is on the ground that resistance to rectification is unconscionable that it is allowed. It is not the contract that it is sought to rectify but the document that failed to embody the true contract. Any instrument can be rectified. Thus a bill of exchange, a disentailing assurance and a deed poll can all be rectified: see Kerr on Fraud and Mistake, 6th ed., pp. 616–8.

[Clauson L.J. There can be no rectification as against a person who was not party to the agreement embodied in the document, and here the company only came into existence at a later date.]

It is the instrument signed before the company came into existence that it is sought to rectify.

[Clauson L.J. Surely the equitable doctrine of rectification is wholly inapplicable to a document given certain effects by statute?]

A disentailing assurance can be rectified, although it takes its effect from enrolment: *Hall-Dare* v. *Hall-Dare* (1); *Meeking* v. *Meeking*. (2) Rectification consists of restoring an instrument to what it ought always to have been. Of course rectification would be impossible against purchasers for value, but here no outsider has become a member of the company. So long as the company is only concerned with the original shareholders, the fact that it has come into existence can make no difference. The Court ought to be strong enough to prevent an injustice. The only reported case where the Court has been asked to rectify articles of association since 1862 is *Evans* v. *Chapman* (3), and in the comment on it in Buckley on Companies, 1909 ed., p. 28, the possibility of rectification, if all the members were of one mind, seems to be recognized. The Court has a very wide jurisdiction to correct a mistake: see *Druiff* v. *Lord Parker* (4), where a bill of exchange was rectified.

(1) (1885) 31 Ch. D. 251.
(2) [1917] 1 Ch. 77.
(3) [1902] W. N. 78; 86 L. T. 38.
(4) (1868) L. R. 5 Eq. 131, 138.

*W. P. Spens K.C.* and *Maurice Berkeley* for the appellant. In his judgment Bennett J. referred to the Companies (Consolidation) Act, 1908, but in considering a cross-appeal made in December, 1939, it is the Companies Act, 1929, that applies. When once the articles of association were registered there could be no question of rectification but only of alteration in the manner permitted by the Act. On registration, the articles become a contract between the company and its members : *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association* (1), and to justify rectification it would have to be shown that the company agreed to something other than that set out in the articles. The statute has laid down the methods in which both the memorandum and articles of association can be altered and those methods are also applicable. (They referred to ss. 10, 50, 55, 58, 85 and 118 of the Companies Act, 1929.) After registration there can be no rectification.

*E. M. Winterbotham* replied.

*Cur. adv. vult.*

1940. June 27. SCOTT L.J. Luxmoore L.J. will deliver the judgment of the Court (Scott, Clauson and Luxmoore L.JJ.).

LUXMOORE L.J. On March 14, 1939, the plaintiff, who is the widow and sole executrix of the will of the late Frank Stanley Scott, instituted this action against a private company incorporated under the Companies Acts, 1908 to 1917, with the name of Frank F. Scott (London), Ld., and her two brothers-in-law, Stuart Arthur Scott and Reginald Scott. The relief claimed was a declaration that upon the true construction of the articles of association of the company and in the events that have happened the plaintiff is entitled to be placed upon the company's register of members in respect of 100 ordinary shares in the company which were registered in the name of her husband at his death. The plaintiff further claimed to have the company's register of members rectified by the insertion therein of her name as the holder of the shares in question, and certain other relief to

(1) [1915] 1 Ch. 881.

which it is immaterial to refer. The defendants challenged the plaintiff's right to be registered as the holder of the said shares and claimed that on the true construction of the articles of association the plaintiff, as the executrix of the late Frank Stanley Scott, was bound to offer those shares to the defendants, Stuart Arthur Scott and Reginald Scott. The defendants also asserted that if, contrary to their contention, the Court should hold that on the true construction of the articles of association the plaintiff was not bound to offer the shares in question to the two personal defendants' they were entitled to have the articles of association of the company rectified so as to provide in effect that all ordinary shares of a deceased member should be offered by his executors or administrators forthwith after his death to the principal shareholders, that is, in the existing circumstances, the personal defendants; and the defendants counter-claimed for a declaration in accordance with the construction for which they contended and for rectification of the articles of association in the manner indicated, if the Court should not accept their contention as to construction. The action was heard by Bennett J. and was dismissed, the learned judge making a declaration on the counter-claim in accordance with the contention of the defendants on construction. He also considered the question whether, had he decided otherwise as to the construction of the articles, he could have made an order for rectification, and he held that the Court had no jurisdiction so to do, even assuming that the articles of association were not in accordance with the proved intention of the two personal defendants and the late Frank Stanley Scott at the time when the articles were signed by them. Bennett J. ordered the plaintiff to pay the defendants their costs of the action and one quarter of their costs of the counter-claim. The plaintiff appeals to this Court from the order of Bennett J., and the defendant Reginald Scott has given notice of cross-appeal from the decision of Bennett J. on the question of rectification in the event of this Court being of a contrary opinion to that expressed by Bennett J. on the question of construction.

It is necessary, therefore, to determine first whether the judgment of Bennett J. on the question of construction is correct.

[His Lordship then dealt with the question of the construction of the articles of association and came to the conclusion that the plaintiff was entitled to a declaration that upon the true construction of the articles of association of the company and in the events that had happened the plaintiff was entitled to the 100 ordinary shares of which Frank Stanley Scott was the registered holder at his death, and was under no obligation to cause them to be offered to the principal shareholders.]

The next question which falls to be considered is whether the defendants are entitled to have the articles of association rectified in the manner claimed by them. Bennett J. said he was prepared to hold that the articles of association as registered were not in accordance with the intention of the three brothers who were the only signatories of the memorandum and articles of association, and down to the date of Frank Stanley Scott's death the only shareholders therein. Bennett J., however, held that the Court has no jurisdiction to rectify articles of association of a company, although they do not accord with what is proved to have been the concurrent intention of all the signatories therein at the moment of signature. We are in complete agreement with this decision. It seems to us that there is no room in the case of a company incorporated under the appropriate statute or statutes for the application to either the memorandum or articles of association of the principles upon which a Court of Equity permits rectification of documents whether inter partes or not. The memorandum and articles of association of any company which it is proposed to incorporate must be signed by the requisite number of persons who desire its incorporation and must comply with the statutory requirements in respect of registration. In the present case the material statute is the Companies (Consolidation) Act, 1908. The statutory requirements therefore are: (I.) the delivery to the Registrar of Companies for that part of the United Kingdom

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in which the registered office of the company is stated by the memorandum to be situated, of the memorandum and articles; (2.) the retention of such memorandum and articles by the Registrar; and (3.) the registration of those documents. (See s. 15 of the 1908 Act.) It is not until all these requirements have been satisfied that the company comes into being and the certificate of its incorporation is issued, and the memorandum and articles become binding upon the company and its members as provided by ss. 14 and 16 of the 1908 Act. The 1908 Act contains powers of alteration and extension of the memorandum and articles, but these are no longer applicable, for the 1908 Act has been wholly repealed by the Companies Act, 1929, save that the incorporation of any company under the former Act is saved by s. 381 of the 1929 Act. The powers to alter and extend are purely statutory and there is no hint in the 1929 Act of any power to rectify; and this applies also to the 1908 Act. It is quite true that in the case of the rectification of a document, such as a deed inter partes, or a deed poll, the order for rectification does not order an alteration of the document; it merely directs that it be made to accord with the form in which it ought originally to have been executed. This cannot be the case with regard to the memorandum and articles of association of a company, for it is the document in its actual form that is delivered to the Registrar and is retained and registered by him, and it is that form and no other that constitutes the charter of the company and becomes binding on it and its members. The legal entity only comes into existence as a corporate body, distinct from the subscribers to the memorandum and articles registered, upon registration. (See ss. 14, 15, 16 and 17 of the 1908 Act, and ss. 12, 13, 15 and 20 of the 1929 Act.) In all cases any change in the name or constitution of the company must be registered with the Registrar. In some cases the alteration is not effective until it is registered; for example, in the case of the change of name of a company (see s. 19 of the 1929 Act), or in the case of a reduction of capital (see ss. 55 and 58 of the 1929 Act); while in other cases the failure to register is made an offence punishable by fine which may amount to a very large sum having regard to the fact that it may be fixed by reference to each day during which the failure to register continues, for example (*a*) any alteration in the share capital of a company (see ss. 50 and 51 of the 1929 Act); (*b*) any variations in shareholders' rights (see s. 61 of the 1929 Act), and (*c*) resolutions altering the articles of association of a company (see ss. 10 and 118 of the 1929 Act). Further the effect of registration of the memorandum and articles of a company under s. 14 of the 1929 Act is to bind the company (which, as already stated, only comes into existence after the registration is effected) and the members thereof to the same extent and in the same manner as if they had respectively been signed and sealed by each member and contained covenants on the part of each member, his heirs, executors and administrators to observe all the provisions of the memorandum and of the articles subject to the provisions of the Act. It seems plain that this section does not admit of any rectification of the memorandum and articles apart from alterations under the express powers of the Act, for the only contract is a statutory contract in which the Company is included by reference to the registered documents and to no other documents. Further, as Bennett J. pointed out, there is no machinery in the 1908 Act, nor is there in the 1929 Act, for compelling the Registrar to register any rectification of the memorandum or articles if the Court should think fit to make such an order.

It is not without significance that during the whole of the long period that it has been competent to incorporate joint stock companies under general statutes there is only one case in which the question has been raised whether the memorandum or articles of such a company can be rectified by the Court: see *Evans* v. *Chapman*. (1) This case came before Joyce J., on a motion in an action to rectify the articles of association. It was apparently admitted on the motion that the mistake sought to be rectified was solely due to a clerical error. The nature of the interlocutory relief sought is not stated in the report. Joyce J. said: "I do not see my

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(1) 86 L. T. 381.

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"way to make the order asked for; no doubt a blunder was "made in drafting the articles, but that can be rectified under "the provisions of s. 50 of the Companies Act, 1862, and is the "proper way of doing it" (that is, by passing a special resolution to alter the articles). "With reference to the "jurisdiction to rectify such a document counsel has not had "much time or opportunity to look into the authorities on "the subject; but on the material before me and as at present "advised, I am of opinion that the general jurisdiction of the "Court to rectify instruments has no application to a document "of this kind, which has only a statutory effect, and can "only be rectified by statutory authority." As all parties to the action appear to have supported the claim to rectification it is probable that the suggestion made by the judge to proceed by special resolution was followed, for the action does not appear to have gone to trial on the question of rectification. For these reasons, as well as for those relied upon by Bennett J., we think the claim to rectify the articles must be rejected. It was urged during the argument by counsel for the defendants that considerable hardship might result unless a power to rectify existed, and to support this view he postulated a hypothetical case in which the articles of a company provided by mistake that the preference shares should carry a fixed dividend of 70 per cent. instead of 7 per cent., the "0" having been inserted owing to a clerical error, and the shareholders who controlled more than one-fourth of the voting power opposed the passing of any special resolution to put the mistake right. It was argued that in such a case the hardship on the ordinary shareholders must be capable of remedy by rectification. We think the short answer to such a case is that the proper remedy would be to petition the Court for an order for the compulsory winding up of the company on the ground that it was in the circumstances just and equitable so to do. We respectfully agree with the refusal of Bennett J. to make any order for rectification.

There remains the question: can the plaintiff insist on having her name registered as the holder of the ordinary shares standing in her husband's name at his death? It is true that the option conferred by clause 22 of Table A of 1908 is not available, but the Court of Appeal has already held in the case of the Liverpool Company that a person entitled to the ordinary shares registered in the name of a deceased member was entitled by necessary implication to be found in its articles of association to be so registered, notwithstanding the express exclusion of clause 22 of Table A and the absence therein of any clause conferring in express terms the like option. In our judgment, having regard to the similarity of the material articles in the two cases, the decision of the Court of Appeal in *In re Frank F. Scott (Liverpool), Ld.* (1) covers the present, and this Court is bound to follow it. Apart from this, however, it seems to us on general principles that where, as in the present case, an executrix has the legal right to the shares of which the deceased testator was the registered holder she is, in the absence of any power of veto conferred on the company by its articles of association, entitled to have her name entered on the register if she so desires as ancillary to her legal title to the shares in question. (See *Buchan's* case (2) per Lord Selborne ; *Heward* v. *Wheatley* (3), per Turner L.J.)

It follows that, in our opinion, the plaintiff is entitled to an order rectifying the company's register of members by inserting the plaintiff's name therein as the holder of the 100 ordinary shares which are still standing in the name of her late husband.

In the result the plaintiff's appeal must be allowed, and the defendants' cross-appeal dismissed. The order of the learned judge dismissing the action must be discharged and the appropriate relief given in accordance with this judgment. With regard to the counter-claim the order of Bennett J. must be discharged and the counter-claim dismissed.

*Appeal allowed. Cross-appeal dismissed.*
*Leave to appeal to the House of Lords refused.*

Solicitors : *Field Roscoe & Co. for Guy Williams & Co., Liverpool ; Layton & Co.*

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(1) Unrep.

(2) 4 App. Cas. 549, 594.

(3) 3 D. M. & G. 628, 646.

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# KING FEATURES SYNDICATE, INCORPORATED, AND ANOTHER *v.* O. AND M. KLEEMAN, LIMITED.

[1938. K. 477.]

*Copyright—Infringement—Sketches and drawings—Comic figure as central feature—Publication in American and Canadian newspapers over series of years—Licences granted to make and sell dolls and toys representing figure—Registrable design—Similar dolls imported and sold without consent of copyright owners—Reproduction in three dimensions of substantial part of original work—Copy of licensees doll—Loss by copyright owner of right to prevent this reproduction—Copyright. Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1, 22*—Patents and Designs Acts,* 1907 *to* 1932.

Between 1929 and 1937 a very large number of sketches and cartoons, of a type known as " comic strips," were produced by E. C. S. and published in American and Canadian newspapers, all embodying as their central feature a grotesque figure dressed in nautical costume, having easily recognized peculiarities, and described and popularly known as " Popeye, the Sailor." The figure having also been popularized by reproduction in English newspapers, the plaintiffs, who claimed copyright in the sketches, granted licences to British firms to make and sell dolls, mechanical toys, brooches and other articles featuring the figure of " Popeye." The defendants applied for a licence, but refused to accept the plaintiffs' terms. They afterwards imported and sold large consignments of similar dolls, toys and brooches under the name of " Popeye " dolls, etc. The plaintiffs claimed an injunction to restrain the defendants from infringing their copyright, and damages for infringement and conversion. The defendants denied infringement and relied on s. 22 of the Copyright Act, 1911 :—

*Held*, by the Court of Appeal (Scott, Clauson and Luxmoore L.JJ.) that the defendants' dolls (but not their brooches) were reproductions in a material form of the plaintiffs' original artistic work and not the less so because they were not copied directly from any sketch of the plaintiffs, but from a reproduction in material form derived directly or indirectly from the original work; and, therefore, that but for s. 22 of the Copyright Act, 1911, they would constitute infringements of the plaintiffs' copyright.

But *held* by Scott and Clauson L.JJ., Luxmoore L.J. dissenting, (1.) that as the plaintiffs' licensees had reproduced in a material form a figure taken from one of the plaintiffs' sketches (which would have entitled the licensees to register the figure as a new and original design under the Patents and Designs Acts) and had used the design as a model or pattern to be multiplied by an industrial process, s. 22 of the Copyright Act, 1911, applied to prevent that Act from applying to the design ;

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(2.) that the plaintiffs had therefore lost the right otherwise conferred on them by the Act of 1911, to prevent other persons from making a like reproduction, and their action against the defendants therefore failed.

So held by the Court of Appeal (Scott and Clauson L.JJ., Luxmoore L.J. dissenting) reversing the decision of Simonds J. ante, p. 523.

APPEAL from Simonds J. (1)

The plaintiffs were King Features Syndicate, Inc., an American corporation, and Frank Cecil Betts, the personal representative of Elzie Crisler Segar, an American artist, who died on October 13, 1938. Segar was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as " Popeye," or " Popeye, the Sailor." These cartoons had appeared in the form of comic strips running to very large numbers, which appeared in newspapers and journals in the United States of America and in Canada, and afterwards in this country. The first strip of drawings was published simultaneously in the United States and Canada in the issue of the New York Evening Journal for January 17, 1929. It was admitted that any copyright in these drawings or cartoons was vested in the plaintiffs or one of them. The figure and get-up of " Popeye " having become very popular, the plaintiffs in or before 1937 granted licences to certain persons and companies to manufacture and sell in the United Kingdom brooches and mechanical dolls simulating the figure of " Popeye."

Large quantities of these articles having been sold, the defendants, O. and M. Kleeman, Ld., who were manufacturers and vendors of toys, approached the plaintiffs asking for a licence to manufacture articles of this kind. The terms on which the plaintiffs were prepared to grant the licence were not acceptable to the defendants and they proceeded, without obtaining any licence, to order articles from Winckler & Co., of Kobe, and they then obtained delivery from them of large amounts of brooches invoiced to them as " Popeye brooches " and of celluloid mechanical figures and plaster dolls invoiced to them under such titles as " Cell. Popeye,"

(1) Ante, p. 523.

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"Plaster filled Popeye," "Clay filled figure Popeye," or "Mechanical Popeye toy."

In these circumstances the plaintiffs brought these proceedings for an injunction to restrain the defendants from infringing their copyright by the importation of dolls, brooches and toys embodying a similar figure and sold under the name "Popeye dolls," etc.; and for damages. The defendants denied the infringement and they also contended by way of defence that the plaintiffs had lost the right to restrain them from reproducing the figure in the cartoons by reason of s. 22 of the Copyright Act, 1911.

Simonds J. said that the first question was whether the drawing could be infringed by something in three dimensions. He thought the introduction into s. 1 of the Copyright Act, 1911, of the words "in any material form whatsoever" laid at rest any doubt on the question. Next, it was argued on behalf of the defendants that the alleged infringing articles did not reproduce any substantial part of the plaintiffs' work, and in this connection it was contended that they could not be reproductions of the plaintiffs' work because they were copied from articles made by the plaintiffs' licensees. This contention was untenable. It must be immaterial whether the infringing article was derived directly or indirectly from the original work. Further, the defendants' articles reproduced a substantial part of the plaintiffs' work. Therefore, apart from s. 22 of the Copyright Act the plaintiffs owned copyright in the "Popeye" drawings which the defendants had infringed.

He turned to the question whether the plaintiffs' sketches were designs capable of being registered under the Patents and Designs Acts, 1907 to 1932, so that copyright could not be claimed in them having regard to s. 22 (1), and after considering a number of authorities came to the conclusion that the plaintiffs' sketches were not "designs" capable of being registered as such under the Patents and Designs Acts (1) and were therefore protected by the Copyright Act.

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(1) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 22: "(1.) This "Act shall not apply to designs "capable of being registered under "the Patents and Designs Act, "1907, except designs which, "though capable of being so "registered, are not used or in-"tended to be used as models or "patterns to be multiplied by "any industrial process."

The defendants appealed. The appeal was heard on May 23, 24, 28, 29 and 30, 1940, and judgment given on July 8, 1940.

*K. E. Shelley K.C.* and *G. S. W. Marlow* (for *A. D. Russell-Clarke,* on war service) for the appellants. The question is whether the figures produced by the appellants are infringements of the plaintiffs' copyright in certain sketches. There is no registered design in respect of figures of "Popeye" produced under licence from the plaintiffs, and that being so, there is no infringement in what the appellants have done. There are two grounds for saying there has been no infringement here: (1.) that the figures sold by the appellants are not reproductions of part of the artistic works, and (2.) that, even if there has been reproduction in material form of part of the drawings, that is immaterial in view of s. 22 of the Copyright Act, 1911. The plaintiffs or their licensees could have got protection by registering their figures as designs, but this they failed to do.

Copyright is defined by s. 1, sub-s. 2, as "the sole right "to produce or reproduce the work or any substantial part "thereof," and s. 2, sub-s. 1, provides: "copyright in a work "shall be deemed to be infringed by any person who, without "the consent of the owner of the copyright, does anything "the sole right to do which is by this Act conferred on the "owner of the copyright." Sect. 6 gives the remedies in respect of an infringement to which the owner of a copyright is entitled "except as otherwise provided by "this Act." Sect. 22 comes in as an exception to s. 6

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(1) Patents and Designs Act, 1907 (as amended by the Act of 1919), s. 93: "'Design' means "only the features of shape, con"figuration, pattern, or ornament "applied to any article by any "industrial process or means, "whether manual, mechanical or "chemical, separate or combined, "which in the finished article "appeal to and are judged solely "by the eye; but does not include "any mode or principle of con"struction, or anything which is "in substance a mere mechanical "device."

and s. 31 provides that no one is to be entitled to copyright otherwise than under and in accordance with the provisions of the Act. The right to relief must therefore be found within the Act itself and the important question that arises here is as to the construction to be put on s. 22.

First, the appellants have not reproduced any part of the plaintiffs' artistic work. "Reproduce" in s. 1 of the Copyright Act, 1911, means the publication of a work that is derived from an original artistic work. If A takes a photograph of some scene and B takes a separate photograph of the same scene, B has not reproduced A's work. Where there are such a number of sketches of the one figure as in this case it is impossible to say that any special one of them has been "reproduced" by any one of the dolls. And as the work complained of at the most reproduces part only of the original work, it is difficult to say that there has been an infringement: see Tomlin J. in *Preston* v. *Raphael Tuck & Sons, Ld.* (1)

[Clauson L.J. If the creator of an idea sells the copyright in one series and then produces a second series of the same idea without looking at the original, is he infringing?]

No. If A makes a sketch of a red frock worn upon a lady, and B, with A's consent, makes a frock upon the lines of the frock worn upon the lady, and if C, without the consent of A or B, makes and sells frocks which are substantially reproductions of the frock made by B, C does not infringe A's copyright, because the frocks are not reproductions of the sketch made by A within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911, and the frock made by B is not an original "work of artistic craftsmanship" within the meaning of that definition of "artistic work" in s. 35 of the Act: *Burke and Margot Burke, Ld.* v. *Spicer's Dress Designs.* (2) That case covers the present one. It has been held that tableau vivant did not infringe the copyright in certain pictures: *Hanfstaengl* v. *Empire Palace* (3), and it was there held that there was no reproduction, although the scheme was the same.

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(1) [1926] Ch. 667, 675-6.

(2) [1936] Ch. 400.

(3) [1894] 2 Ch. 1, sub-nom. *Hanfstaengl* v. *H. R. Baines & Co.* [1895] A. C. 20.

Even assuming that some of the defendants' goods are substantial reproductions of the plaintiffs' artistic work, still the plaintiffs have no remedy. Under s. 22 of the 1911 Act no design can be a subject of copyright. The definition of "design" is in s. 93 of the Patents and Designs Act, 1907, as amended by the Patents and Designs Act, 1919. Under s. 49, sub-ss. 1 and 2, of the Patents and Designs Act, 1907, the proprietor of a new or original design can register it under several classes. If the plaintiffs have a copyright in this case it makes nonsense of the Patents and Designs Acts. They ought to have made a doll and registered that: see Copinger on the Law of Copyright, 7th ed., at p. 402, where r. 92 of the Designs Rules, 1932, is set out.

If the plaintiffs could have registered under the Patents and Designs Acts they cannot claim protection under the Copyright Act: *Pytram, Ld.* v. *Models (Leicester), Ld.* (1) That case was followed by Farwell J. in *Wood* v. *Stoddarts, Ld.* (2), but he arrived at the same conclusion independently of Clauson J. A like decision in regard to certain sketches was arrived at in *Con Planck, Ld.* v. *Kolynos, Inc.* (3) It follows from those cases that any three-dimensional article, of which the appeal is in its shape and not its mode of construction, is a registrable design. A purely mechanical article is not registrable, but a statuette is. Then an engraving must be registrable. Any print must also be registrable, as paper comes within the definition of "article." A photograph, although intended to be multiplied by an industrial process, is not a "model or pattern" within the meaning of s. 22. The word "lawfully" ought to have been inserted and is impliedly inserted before the words "used or intended to "be used" in s. 22, and therefore the first words of that section apply here. The original sketch may or may not be a design, but if it is reproduced in a form that is a design that does not come within the Act of 1911. The whole question of copyright and designs is dealt with in Copinger on the Law of Copyright, 7th ed., pp. 65–69. A sketch is not a design, but a reproduction in three dimensions is.

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(1) [1930] 1 Ch. 639.

(2) (1931) Macg. Cop. Cas. (1928–35) 294.

(3) [1925] 2 K. B. 804.

Simonds J. has not applied his mind to the whole question. The appellants have not infringed any copyright, because what they sell is a registrable design originally authorized by the respondents.

*E. J. Macgillivray K.C.* and *Frank Gahan* for the respondents. The dolls the appellants are selling are material reproductions of part of some, at least, of the sketches. It is the artistic conception, not the form, that the Copyright Act, 1911, protects. Under s. 22 of that Act the appellants can only succeed if they establish that the original conception was a design, or they must show that the work they have reproduced was capable of being registered as a design.

The original sketches were not designs: an artistic work can never be a design. It is an infringement of a drawing to reproduce it in any material form. "Popeye" as originally produced in the sketches was not a design for a toy capable of registration as such. No design for a toy came into existence until some one took the drawing of "Popeye" and exercised the necessary ingenuity required to make a three-dimensional figure, for which purpose a back and sides had to be provided for the figure. No doubt the three-dimensional figure could have been registered as a design, but that does not affect the rights of the plaintiffs. *Saunders* v. *Wiel* (1) illustrates the radical difference between the source from which a design is taken and the design. It is absurd to say that a drawing is a design. The paper on which it is made is merely the vehicle for the artistic work. A sculptured work differs greatly from a sketch. Such cases as *Pytram, Ld.* v. *Models* (*Leicester*), *Ld.* (2) and *Wood* v. *Stoddarts, Ld.* (3), are far from the present case. If it were held that a painting or drawing could become registrable as a design the extraordinary result would follow that as soon as an authorized engraving of the work were made, the artist would lose his

(1) [1893] 1 Q. B. 470, 475.
(2) [1930] 1 Ch. 639.
(3) Macg. Cop. Cas. (1928–35) 294.

copyright. The argument that s. 22 of the Copyright Act, 1911, applies in the sense of saying that the Act shall not apply at all to designs capable of registration with the result not only that no copyright can exist in a design but also that a design cannot be an infringement of a copyright is entirely erroneous. The section merely means that the Copyright Act is not to apply for the protection of a design. It does not deprive the owner of a copyright of his rights by taking an infringement out of the category of infringements because it is capable of registration as a design. In the expression "shall not apply to designs capable of being registered under "the Patents and Designs Act, 1907" the words "shall not "apply to" means "shall not apply to give protection to." This provision was made necessary because the category of works protected by the Act was greatly enlarged: see s. 35, by which works of artistic craftsmanship were included. Further, by the old law there was no infringement without copying, but under the Act of 1911 a far wider protection is given: see s. 1, and the definition of copyright. The object of s. 22 was to prevent what was merely an industrial design from getting protection beyond that conferred by the Patents and Designs Acts. Sect. 22 could not be intended to limit the rights of the author of artistic work as against persons reproducing for commercial purposes. In the exception in s. 22 of "designs which though capable of being registered, "are not used . . . . as models or patterns to be multiplied "by any industrial process" the appellants' argument involves the reading of "are not used" as "are not "lawfully used," but the words "are not used" must mean are not used by the proprietors of the design. The section has no application to the copyright in an author's artistic work. It is contrary to the respondents' argument that the words "shall not apply" should be construed as meaning "has nothing to do with." [They referred to *Hanfstaengl* v. *H. R. Baines & Co.* (1)]

Lastly, there was clearly an infringement of part of the plaintiffs' sketches here. It is immaterial that the appellants

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(1) [1895] A. C. 20.

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did not copy directly from the sketches, but copied dolls and brooches made by the plaintiffs' licensees. [They referred to *Gramophone Co. Ld.* v. *Stephen Cawardine & Co.* (1); *Brooks* v. *Religious Tracts Society* (2); *Bradbury Agnew & Co.* v. *Day* (3); *Burke* v. *Spicer's Dress Designs* (4); *Chabot* v. *Davies* (5); and *Preston* v. *Raphael Tuck & Sons, Ld.* (6)] The present is a stronger case than *Preston* v. *Raphael Tuck & Sons, Ld.* (6), for there the reproduction was of a type, but here the infringement is of an entirely original fictional character which the respondents have named "Popeye." That person was reproduced over and over again in the sketches but there is no earlier drawing of this character. The appellants' doll is a clear infringement of "Popeye" in No. 3 drawing, in which the figure of "Popeye" is the substantial part of the picture. *Brooks* v. *Religious Tracts Society* (2) exactly covers this case in regard to the issue of infringement.

[Clauson L.J. I have not yet seen any drawing alleged to have been copied in the brooch.]

If the Court takes that view as to the brooches the respondents are not much concerned to insist on that part of their case.

[They also referred to *King Features Syndicate, Inc.* v. *Fleischer.* (7)]

*K. E. Shelley K.C.* in reply. To establish infringement it must be shown that the infringement is derived from a specific copyright work. Here there are a large number of sketches including "Popeye." All that can be said here is that there is a certain resemblance in the dolls to many of the sketches and that is not enough: compare *Hanfstaengl* v. *H. R. Baines & Co., Ld.* (8), which shows there must be something more than similarity. In any case the brooches are very dissimilar and they are not an infringement of any sketch. Next, the suggested construction of s. 22 of the Act of 1911 puts an improper limitation on the words "shall

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(1) [1934] Ch. 450.
(2) (1897) 45 W. R. 476.
(3) (1916) 32 Times L. R. 349.
(4) [1936] Ch. 400.
(5) (1936) Macg. Cop. Cas. 56; [1936] W. N. 308.
(6) [1926] Ch. 667.
(7) (1924) 299 Fed. Rep. 533.
(8) [1895] A. C. 20.

"not apply." The true construction is that no part of the Act is to have to do with designs capable of registration under the Patents and Designs Acts.

[Luxmoore L.J. Is the appellants' contention that the owner of a copyright loses his copyright as soon as he allows a design to be made for commercial purposes ?]

No. He only loses it so far as regards that particular article, and the appellants are saved from being infringers because they have copied a design authorized by the copyright owners. The makers of the design could have registered it as a design and so obtained the protection conferred by the Patents and Designs Acts. The construction contended for by the appellants avoids all difficulties in applying the section.

*Cur. adv. vult.*

1940. July 8. Scott L.J. I think it will be convenient for Clauson L.J. to read his judgment first.

Clauson L.J. In this action the plaintiffs are claiming the usual relief in respect of an alleged infringement by the defendants of the plaintiffs' copyright in certain drawings, and Simonds J. has held that they are entitled to that relief in respect of certain dolls and other articles marketed by the defendants.

The learned judge rightly pointed out that the first question to be determined was whether, apart from s. 22 of the Copyright Act, 1911, the articles of which the plaintiffs complain are such reproductions in a material form of the plaintiffs' work as to constitute infringements of the plaintiffs' copyright. As regards the doll which is a specimen of a very large number of precisely similar dolls manufactured by the defendants, it is impossible to doubt that it is a reproduction in a material form of a substantial part of an original artistic work of the plaintiffs, being the sketch No. 3 published in the New York Evening Journal under date January 17, 1929. In that sketch the background and accessories are so wholly subordinate to the one figure which is delineated in the sketch that the sketch is little more than a sketch of the figure, which is a grotesque representation of a sailor. A comparison with that sketch of the doll marked as exhibit B1 leads inevitably to the conclusion that it is a reproduction in material form of the figure sketched, and is accordingly a reproduction in material form of a substantial part of the artistic work constituted by the sketch No. 3. A number of other sketches subsequently published by the plaintiffs were put in evidence in which the same figure appears as the principal feature in the representation of a number of humorous incidents. It was suggested that the existence of those other sketches makes it doubtful whether the Court could properly infer that the doll reproduced a substantial part of sketch No. 3; and it was suggested that in fact the designer of the doll had copied not the original sketch No. 3, nor any of the other sketches, but a doll made by a licensee of the plaintiffs to represent the figure delineated in the sketches. There can be no doubt at all that a figure which in fact reproduces an original artistic work consisting, in substance, of a sketch of that figure, is none the less a reproduction of the original artistic work, because the maker of it has copied it not directly from the original but from some representation derived directly or indirectly from the original work. It seems to have been suggested in the Court below that the fact that the alleged infringement was in three dimensions, whereas the original was in two, prevented the plaintiffs making good their claim. I agree with the learned judge that while this circumstance may add to the difficulty of forming a conclusion on the degree of resemblance between the infringing article and the original, the plain words of the Act (" in any material form ") get rid of any difficulty there might otherwise have been in treating a copy in three dimensions as an infringement of copyright in a sketch in two dimensions. I cannot agree with the suggestion that the decision in *Burke* v. *Spicer's Dress Designs* (1) gives colour to any different view.

In the view thus expressed the plaintiffs would, but for the point of law dealt with below, be entitled to a declaration

(1) [1936] Ch. 400.

that articles in the form of exhibit B1 and exhibits C and E (which are mere variations of B1) are infringements of the plaintiffs' copyright in the sketch No. 3, and an injunction restraining the defendants from infringing the copyright of the plaintiffs in the sketch No. 3 by making or causing or authorizing to be made, without the consent of the plaintiffs, articles reproducing in material form the figure of a sailor delineated in the sketch No. 3 or by selling the same or by way of trade exposing or offering the same for sale. The injunction granted in the Court below was, however, framed in somewhat wider terms on the ground, as it would seem, that certain brooches, being exhibits F and F1, were similarly infringements of some or other of the plaintiffs' sketches. This matter is not specifically referred to by the learned judge. It will suffice for the purpose of this case to say that on a careful comparison of the brooches with the various drawings I cannot find sufficient similarity to satisfy me that the brooches are such reproductions as to infringe the plaintiffs' rights, whether in the sketch No. 3 or in any of the other sketches which were in evidence. Accordingly, assuming the point of law arising under s. 22 of the Act and dealt with below to be decided in favour of the plaintiffs, they would not, in my view, be entitled to any wider relief than would be given by the declaration and injunction indicated above. On the same assumption, the inquiry should run as follows: "An inquiry "what damages (if any) have been sustained by the plaintiffs "by reason of the infringement by the defendants as in the "above declaration mentioned of the plaintiffs' copyright in the "sketch No. 3 and by reason of the conversion by the defendants "of articles which so infringe the plaintiffs' said copyright."

There remains, however, a further point to be considered, and that is whether s. 22 of the Act prevents the plaintiffs from obtaining relief in certain circumstances which are stated in the learned judge's judgment and may be summarized as follows. In the year 1937 the plaintiffs were minded to make money out of the sale of models in the form of the figure in sketch No. 3 which I have already mentioned, and they did so by licensing certain persons to reproduce that

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figure in a material form, with a view to such reproduction being used as a model or pattern to be multiplied by an industrial process, and in fact a very large number of such reproductions have been made, the reproductions being in fact, as was agreed, substantially in the form of B1. It was, indeed, suggested, and seems to be the case, that the defendants' exhibit B1 was, as a matter of historic fact, copied from one of these licensed reproductions. Neither the plaintiffs nor their licensees have registered any reproduction of the figure under the Designs Acts.

The defendants contend that, on those facts, the plaintiffs have lost the right to restrain the defendants from reproducing the figure in sketch No. 3 in a material form, by reason of the provisions of s. 22 of the Copyright Act, 1911. The steps in the reasoning which lead to this result can be stated as follows : With the authority of the plaintiffs, their licensees reproduced the figure sketched in sketch No. 3 in a material form by applying that figure's features of shape and configuration to a model. Those licensees thus became for the purposes of the Designs Acts, by virtue of clause (*b*) of the definition of " proprietor of a new or original design " in s. 93, proprietors of the design of that model, and thus became qualified to register the design constituted by that model under s. 49 of the Act. It is well settled (see *In re Clarke's Registered Design* (1)) that the fact that the figure sketched had been already published to the world before it was used as a prototype of a three-dimensional figure, would not prevent the design being a new or original design within the meaning of the Designs Acts as a design to be applied to an article. Apart from the definition of " article " contained in the Designs Acts (see s. 93) it might have been suggested that a design could not be registered unless it were intended to be applied to an article of manufacture with an existence or a function independent of the design. This suggestion is, however, disposed of by the fact that the word " article " is defined in s. 93 to include " any "substance artificial or natural or partly artificial and partly

(1) (1896) 13 R. P. C. 351.

"natural." It would, therefore, appear to follow that the mere reproduction of the sketch of the figure in question by copying it in a material substance produces a design which the proprietor may register.

If it be the fact that the plaintiffs' licensees thus became qualified to register the three-dimensional representation of the figure in question as a design under the Designs Acts, it must follow that a three-dimensional representation of the figure is a design capable of being registered under the Designs Acts. On turning to s. 22 of the Copyright Act, 1911, one finds that the Act is not to apply to designs capable of being registered under the Designs Acts if such designs are used or intended to be used as models or patterns to be multiplied by any industrial process. In the present case it is clear on the facts that the design, that is to say the representation of the grotesque sailor in three-dimensional form, is in fact used (namely, by the plaintiffs' licensees) as a model or pattern to be multiplied by an industrial process; hence the effect of s. 22 would seem to be that in the circumstances the Copyright Act does not now apply to the design in question; that is to say, to the representation of the grotesque sailor in three dimensions.

If this view of the operation of s. 22 is correct, it is obvious that the plaintiffs must fail in the present action, since the infringement of which they complain is an infringement by reproducing in a three-dimensional form their representation of a grotesque sailor.

Whether this view of the law which emerged in the course of argument before this Court was presented by the defendants to the learned judge does not clearly appear. He decided that s. 22 was no bar to the plaintiffs' success in the action. The ground of his decision appears to be that the sketch alleged to be infringed could not be registered as a design since it was not produced as a model or pattern to assist in making some other thing. He seems to adopt, though with some hesitation, the view that if the original artistic work had been a work of sculpture it would have been capable of being registered as a design, presumably because its features of shape and configuration would be capable of being applied as a pattern to assist an artificer in making some other article. He seems, however, to regard s. 22 as inapplicable because, as he points out, the plaintiffs' sketch cannot itself be registered as a design. That may well be so, but that does not meet the point, which is the defendants' sheet anchor, that a representation of the plaintiffs' sketch in a material form may well be, indeed would appear plainly to be, a design capable of being registered under the Designs Acts.

It is helpful to consider what, on the defendants' interpretation of s. 22, is the result as regards such a sketch as that now in question. The plaintiffs have the copyright in the sketch for fifty years or more. They may themselves make a reproduction of the sketch in a material form and use that reproduction as a model or pattern to be multiplied by an industrial process. If so they lose the right to prevent others from making a like reproduction of the sketch, but have the right, on registering this reproduction under the Designs Acts, to a monopoly in the design for a period which may ultimately extend to fifteen years from the date of registration. In the first instance, no one but the plaintiffs can produce the design from the sketch without the plaintiffs' permission, but if the plaintiffs permit a licensee to produce the design from the sketch with a view to multiplication of it by an industrial process the plaintiffs' artistic copyright in that design, that is, in that reproduction of the sketch in a material form, vanishes, though the licensee can secure the fifteen years' industrial copyright in that design by registration.

A construction of s. 22 which leads to this result seems to be a perfectly reasonable construction. It must be borne in mind that before the Act of 1911 the plaintiffs as makers of the sketch would have had no right to prevent the reproduction of their sketch in a material form. If they desired to prevent reproduction of the sketch in three-dimensional form as a model to be multiplied by an industrial process they could attain their object only by themselves producing the model and registering it under the Designs

Acts, in which case they would secure monopoly for fifteen years, but for no longer, in the design.

The extension of artistic copyright by the Copyright Act, 1911, so as to prevent reproduction in a material form made it essential to make some such provision as is contained in s. 22, otherwise the Designs Acts would in practice have ceased to exist so far at all events as concerns designs intended for multiplication by an industrial process copied from a sketch and applied to "articles," as defined by the Designs Acts; that is: "Any article of manufacture or any "substance artificial or natural or partly artificial and partly "natural." But for s. 22 every author of an artistic work would have the right for the copyright period of at least fifty years to prevent any design copied from his work being used for multiplication by any industrial process. Such a change in the rights of the author of an artistic work would not only operate as a very great extension of his monopoly, but would cut across the policy of the Designs Acts, which is to confine monopoly in designs used for multiplication by an industrial process to a period of fifteen years and to designs which are publicly registered as protected by the Act.

In the present case neither the plaintiffs nor their licensees have registered under the Designs Acts the design copied from the plaintiffs' sketch and multiplied by an industrial process. It follows that the defendants cannot be prevented by anything in the Designs Acts from copying that design, and s. 22 of the Copyright Act has the effect, in the circumstances of the case, of excluding from the copyright vested in the plaintiffs under that Act the right to prevent any reproduction of their sketch which reproduces the design taken from it which might have been, but has not been, registered under the Designs Acts.

The defence set up under s. 22 of the Copyright Act, 1911, should thus, in my judgment, succeed, the appeal should be allowed, and the action dismissed with costs here and below.

Scott L.J. I will ask Clauson L.J. to read the judgment of Luxmoore L.J.

Clauson L.J. The judgment I am about to read is that of Luxmoore L.J.

This action was instituted on June 3, 1938, by King Features Syndicate Incorporated (hereinafter referred to as " the syndicate ") and Elzie Crisler Segar against O. & M. Kleeman, Ld. (hereinafter referred to as " the defendant company ").

The object of the action was to obtain an injunction to restrain the infringement by the defendant company of copyright alleged to be vested in the plaintiffs or one of them in respect of a number of drawings. The plaintiffs also claimed damages and other ancillary relief usual in copyright actions.

The drawings in respect of which copyright was claimed were alleged to be original artistic work within the definition contained in s. 35, sub-s. 1, of the Copyright Act, 1911, their author being the plaintiff Segar. The drawings relate to and purport to depict imaginary scenes and incidents in the life history of a fictitious character evolved by the plaintiff Segar and called by him " Popeye " or " Popeye, the Sailor." They were prepared in sets or strips, each set or strip containing usually some five separate drawings. " Popeye," as I will call him, appears in each set or strip of drawings in various attitudes, but he is invariably portrayed as a grotesque figure dressed as a sailor with a sailor's cap on the back of his head wearing a sailor's jacket with the sleeves turned up above the elbows so as to show an anchor on each forearm and wearing also very wide bell-shaped trousers with enormous boots showing beneath. He has a pipe sticking out of an exceedingly wide mouth.

The first set or strip of drawings relating to " Popeye " was published for the first time in the United States of America and simultaneously in Canada in the issue of the New York Evening Journal for January 17, 1929. It was alleged that each subsequent set or strip of drawings relating to " Popeye " was published for the first time simultaneously in the United States of America and Canada in subsequent issues of the New York Evening Journal. It is admitted that under the relevant Canadian legislation and by virtue of a certificate given under s. 25 of the Copyright Act, 1911, the sets or strips so published confer on the original plaintiffs or one of them copyright in the United Kingdom unless the right thereto is excluded by reason of the provisions of s. 22 of the Copyright Act, 1911. The drawings appear to have become exceedingly popular and have been reproduced under licence from the original plaintiffs in newspapers and journals in the United States of America and Canada and subsequently in this country, while in or about the year 1937 the syndicate granted licences to certain persons or companies to manufacture and sell in the United Kingdom mechanical dolls and brooches, to use the words of the respective licences, "utilizing the title of 'Popeye' and simulating the figure" of this fictitious character. The licences referred to provided for the payment to the plaintiffs of royalties in respect of the user authorized.

The defendant company, who are manufacturers and vendors of toys, approached the syndicate with a view to obtain a licence for "the marketing of 'Popeye the Sailor'." The application was originally made by the defendant company to the Paramount Film Service, Ld., of 166, Wardour Street, London, in the mistaken belief that that firm was the owner of the copyright in the drawings. This application was forwarded by the Paramount Films to one Frank C. Betts, who was the agent of the syndicate and the plaintiff Segar. Mr. Betts wrote on March 13, 1937, to the defendant company stating that "this character"—meaning "Popeye"—"is the "copyright of" the syndicate. "We are prepared to issue "licences for novelties embodying this character and we shall "be glad to know the precise novelty you have in mind. "There are already a number of novelties in being." The letter stated the terms generally required. The defendant company, in reply to this letter, stated that they were not interested "under the circumstances to handle the line under "the conditions mentioned."

Before the two letters referred to were written, the defendant company had been in correspondence with one of its directors

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who was then travelling in Japan and had sent to him on February 24, "a sample of brooch Popeye Sailor which is "being sold in large quantities to showmen." The letter contained this statement: "It"—that is, the Popeye brooch—"is being sold by Cecil Coleman at 12*s*. per gross "and I think we could do quite a big business in this." In the result the defendant company gave an order to a firm in Japan known as Winckler & Co., of Kobe, and goods were dispatched by that firm to the defendant company in the United Kingdom which were invoiced under the description "Popeye brooches each on a card 200 gross 5*s*. 6*d*. per gross." This was followed by numerous other consignments of similar brooches and at a later date by consignments of celluloid mechanical figures and plaster dolls described in the relative invoices as "Cell. Popeye" or "Plaster filled Popeye" or "Clay filled figure Popeye" or "Mechanical Popeye toy" or by some other similar title. Some of these importations were made after the writ in this action was issued. Counsel for the plaintiffs and defendant company respectively invited the learned judge to deal with the matter on the footing that all the goods referred to were imported to this country before the writ was issued.

As I have already stated, the writ was issued on June 3, 1938. It claimed "an injunction, damages and other "appropriate relief in respect of the infringement of their "copyright in the 'Popeye' cartoons published in the issue "of the New York Journal for 17th January, 1929, and in "later issues of the same journal and in other publications by "making without the consent of the plaintiffs models, "photographs, drawings, brooches, toys and other articles "reproducing in material form the 'Popeye' figure in the "said cartoons and/or selling or offering the same for sale."

While the action was pending, namely, on October 13, 1938, the plaintiff, Elzie Crisler Segar, died, and on November 22, 1938, Frank Cecil Betts became his legal personal representative in this country. He was added as a co-plaintiff with the syndicate in the place of the said E. C. Segar by an order made in this action on December 7, 1939.

In the course of the interlocutory proceedings, the plaintiffs, for convenience, selected from the large number of sets or strips of drawings relating to " Popeye," which were said to exceed 2000, some fifty-five sets or strips of drawings, including the set or strip first published in the New York Evening Journal on January 17, 1929. The plaintiffs claim that all the articles imported from Japan infringe their copyright.

Samples of the Popeye brooches imported by the defendant company were produced at the trial and were marked F and F1 respectively. Samples of the celluloid mechanical figures and plaster dolls were also produced at the trial and these were marked B1, C and E respectively. It will be seen that the figures and dolls last mentioned are practically identical in design, the only differences being in size and material.

The defendant company relied upon a number of defences. First, it was contended that, assuming the plaintiffs were entitled to copyright in the sets or strips of drawings referred to, such copyright being in drawings in two dimensions could not be infringed by the production of an article in three dimensions.

The second contention was that the articles alleged to constitute infringement of the plaintiffs' copyright, assuming it to exist, did not reproduce any substantial part of the plaintiffs' work and, in this connection, a subsidiary contention was raised on behalf of the defendant company to the effect that the alleged infringing articles could not be reproductions of any work in which the plaintiffs claimed copyright, because the imported articles were copied from the articles made by the plaintiffs' licensees and not from any of the original drawings, although it was admitted that such licensees had designed the brooches and dolls or toys made by them from some one or other of such drawings.

The third contention put forward on behalf of the defendant company was that, as the defendant company's brooches, dolls or toys were respectively copied from similar articles made by the plaintiffs' licensees and as it had not been proved or admitted that, first, the latter articles had been derived from any of the drawings comprised in the fifty-five sets or strips upon which the plaintiffs had relied rather than any other of the Segar drawings or, secondly, that any of the Segar drawings other than the said fifty-five sets or strips had been published in Canada simultaneously with publication in the United States of America, it was not proved that any copyright had been infringed.

The fourth and last contention of the defendant company was based on s. 22 of the Copyright Act, 1911. As stated by Simonds J. in his judgment, the question was whether the works in which the plaintiffs claimed copyright consist of designs which are capable of being registered under the Patents and Designs Act, 1907, and do not fall within the exception contained in the said section.

Simonds J. answered each of these contentions in favour of the plaintiffs and granted the plaintiffs the appropriate injunction and the relief usually granted to a successful plaintiff in an action for infringement of copyright and ordered the defendant company to pay the plaintiffs' costs of action. The defendant company has appealed to this Court and has raised the same contentions as were raised before Simonds J. and has, in addition, contended that, even if s. 22 of the Copyright Act, 1911, had no application at the date when the plaintiffs' copyright in the drawing was acquired, yet, by reason of its provisions, the plaintiffs have, in the events that have happened, lost the right to restrain infringement, because the plaintiffs' licensees became entitled to register the models made by them under their licence as designs under the Patents and Designs Act, 1907.

I propose to deal with each of the contentions raised in the order in which I have stated them. First, assuming that the plaintiffs are entitled to copyright apart from either of the contentions raised under s. 22 of the Copyright Act, 1911, do the articles of which the plaintiffs complain infringe the copyright in any of the Segar drawings on which reliance is placed by the plaintiffs? In considering this question it is essential to bear in mind, first, that there is no copyright either in the fictional character as such appearing throughout the whole of the sets or strips of drawings or in the titles "Popeye" or "Popeye, the Sailor," and, second, that the question of infringement must be considered with reference to a particular drawing and not in respect of a set or strip of drawings or a number of such sets or strips. I will, therefore, take the first drawing in which "Popeye, the Sailor" appeared, namely, drawing No. 3 in the set or strip of drawings published in the New York Evening Journal on January 17, 1929, because it is on this drawing that all the subsequent representations of "Popeye" are based, and I will compare it with the exhibit B1. Although this drawing is in two dimensions and the exhibit B1 is in three dimensions, it is plain beyond possibility of doubt that the exhibit B1 is either directly or indirectly derived from the drawing. Every feature of the figure depicted in the drawing is reproduced in B1. The exhibit B1 appears to be a reproduction of the figure depicted in the particular drawing, to use the words of sub-s. 2 of s. 1 of the Copyright Act, 1911, in a "material form." As Simonds J. pointed out in his judgment, the words "in any "material form whatever" are not to be found in the Fine Arts Copyright Act, 1862, and their presence in the Copyright Act, 1911, lays at rest any doubt which might have been felt with regard to the infringement of a two dimensional drawing of a figure by a three dimensional representation of the same figure. I find myself in entire agreement with the judgment of Simonds J. on this point and also with that of my brethren in this Court. I also am unable to find any support for the appellants' contention in the judgment of my brother Clauson in *Burke* v. *Spicer's Dress Designs*. (1)

The second contention was that there was no infringement because the infringing articles did not reproduce any substantial part of the plaintiffs' work. With regard to dolls or toys, of which B1 is an example, I find that the drawing above referred to with which I compared B1 consists of the figure of "Popeye" alone. He is depicted as standing on a pier with a large bollard in the background and in the far distance there is a suggestion of cottages.

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(1) [1936] Ch. 400.

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In the drawing, the background and distance occupy an entirely subordinate position in relation to the figure which can only properly be described as the substantial feature of the drawing. I agree with the learned judge and with my brethren that this contention fails. With regard to the brooches F and F1, which Simonds J. held to infringe the plaintiffs' copyright, I have arrived at the same conclusion as my brethren in this Court, because, having compared each of the figures reproduced on the two brooches with the available drawings, I have been unable to find any substantial resemblance between either of the brooches and any of these drawings. I think no relief ought to be given in respect of this part of the claim. With regard to the point raised by the defendants under this head, that the alleged infringing article B1 could not be said to reproduce any substantial part of the plaintiffs' said drawing because it was copied from an article made by the plaintiffs' licensees, if this be the fact, there can be no doubt that the licensees reproduced their figure of "Popeye" from the first drawing or from some later reproduction of the figure appearing in the first drawing and I respectfully agree with the judgment of the learned judge and do not desire to add anything to it.

The third contention appears to merit the strictures made with regard to it by Simonds J. I am in entire agreement with the reasons for which he rejected this contention and I respectfully adopt them.

There remain the contentions based on s. 22 of the Copyright Act, 1911. That section provides: "This Act shall not "apply to designs capable of being registered under the "Patents and Designs Act, 1907, except designs which, though "capable of being so registered, are not used or intended to "be used as models or patterns to be multiplied by any "industrial process." The Patents and Designs Act, 1907, has been extended and to some extent repealed and is now represented by the Patents and Designs Acts, 1907 to 1919 (hereinafter referred to as "the Consolidated Act"). The short answer to the first argument under this head appears to be that the drawings, of which that numbered 3 in the first strip is an example, are not capable of registration as designs under the Consolidated Act. By that Act "designs" are defined in s. 93 as being "only the features of shape, configuration, pattern or ornament applied to any article by any "industrial process or means, whether manual, mechanical or "chemical, separate or combined, which in the finished article "appeal to and are judged solely by the eye; but does not "include any mode or principle of construction, or anything "which is in substance a mere mechanical device" while "article" is defined in the same section as meaning "any "article of manufacture and any substance artificial or "natural or partly artificial and partly natural."

In the present case, although it is obvious that any of the drawings might be reproduced in the original form by some industrial process or means, as in fact they were in the various newspapers in which they appeared, it is equally plain that none of the drawings could be applied in their original form to any article as defined by s. 93 of the Consolidated Act and that, before anything based on any of the drawings could be so applied, a model or pattern must be first evolved from it or them. A model or pattern so evolved could undoubtedly be registered as a design under the Consolidated Act, but the model or pattern in that case is a different thing from the drawing to which artistic copyright attached under the provisions of s. 1 of the Copyright Act, 1911. Further, if the model or pattern is evolved by any person other than the owner of the artistic copyright in the basic drawing, the consent of the owner must be obtained, for the evolution of the model or pattern, for the reasons already stated in connection with the first contention, must, in the absence of such consent, of necessity infringe his copyright. No doubt if the necessary consent is obtained, the person responsible for the making of the model or pattern could, as the proprietor of a new and original design, register the model or pattern under the Consolidated Act, but in that case the registration could only protect the model or pattern as registered and would not prevent the registration of some other model or pattern derived from the same drawing or from some other drawing of

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"Popeye," provided the differences between the two models or patterns are sufficiently distinctive. Indeed, it may well be possible to evolve independently a number of distinctive models or patterns of "Popeye" from the same drawing, each of which could be registered as a design under the Consolidated Act, for it is well settled that in cases where, as in the case of "Popeye," the subject-matter of a registered design is well known the protection is narrower than where the subject matter is not well known: see *Dean's Rag Book Co., Ld.* v. *Pomerantz & Sons* (1), and the cases there cited. But in any such case it is the model or pattern which is capable of registration under the Consolidated Act and not the original drawing. The original drawing or drawings became the subject matter of copyright by reason of the provisions of s. 1 of the Copyright Act, 1911, for the period defined by the Act. I find myself in agreement with the judgment of Simonds J. on this point also.

With regard to the last contention, namely, that the plaintiffs have lost their artistic copyright by reason of the licence granted by them to the two licensees, it seems to me that s. 22 of the Copyright Act cannot be construed so as to deprive an artistic work, which is not capable of registration as a design under the Consolidated Act, of the copyright originally acquired in respect of it by giving permission to a third party to use the work as the basis of a registrable design. The section appears to me to have, on its true construction, no further object than to prevent the application of the Act to a work itself capable of registration as a design under the Consolidated Act so as to confer on such work artistic copyright. I can find nothing in the section which deprives an artistic work, to which copyright has already attached, of that copyright because one of a number of possible registrable designs has by consent of the owners of the copyright been evolved from it. The Act itself certainly gives no hint that artistic copyright, when once obtained, may be lost either for the whole or a part of the statutory period which has already been brought into existence by the Act. I find myself unable to agree with my brethren that the plaintiffs have, by reason of the provisions of s. 22 of the Copyright Act, been deprived of their artistic copyright in their drawings or in the particular drawing No. 3 on the strip published on January 17, 1929, already mentioned.

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(1) (1930) 47 R. P. C. 485, 491.

I would dismiss this appeal with costs, but I would vary the order made by Simonds J., by declaring that each of the exhibits B1, C and E is an infringement of the plaintiffs' copyright in the drawing No. 3 and, by limiting the injunction to be granted to the terms of that declaration. The enquiry as to damages should be "an enquiry what damages, if "any, have been sustained by the plaintiffs by reason of "the infringement by the defendant company of the plaintiffs' "copyright in the drawing No. 3 and by reason of the "conversion by the defendant company of the articles which "so infringe the plaintiffs' copyright."

Scott L.J. I have read both my colleagues' judgments. I should have been prepared to adopt that of Clauson L.J. as the judgment of the Court. Like him I accept the statement of facts contained in the judgment of Simonds J. and find it unnecessary to repeat them. He and I, and also Luxmoore L.J., agree with the learned judge that the celluloid doll B1 representing the comic figure of "Popeye, the Sailor" and its smaller counterpart C, and E (in another material) prima facie constitute infringements of the plaintiffs' sketch No. 3. I agree also with the concluding part of the judgment of Clauson L.J. that to the plaintiffs' prima facie right of action the defendants have a good defence under s. 22 of the Copyright Act, 1911, which entitles them to have the appeal allowed; but Luxmoore L.J. disagrees on that issue.

I need hardly say that I discharge my responsibility of deciding between them with diffidence; but, having listened with care to the arguments of counsel, thought over the language of the statutes and considered both my colleagues' judgments, I find myself definitely in agreement with my brother Clauson's conclusion as to s. 22.

The issue there turns on the words of the first sub-section.

It says: "This Act shall not apply to designs" of a particular class and that class, in spite of a double exception, is clearly defined. The first logical step is to ask to what designs the Act does apply. Ex hypothesi the works to be protected are "artistic works" within s. 1, sub-s. 1. The next step is to consider whether "the design," from which s. 22 withdraws the statutory protection, must be the whole "artistic work" so protected. Clearly not, because "copyright" is defined by s. 1, sub-s. 2, as "the sole right to produce or reproduce "the work or any substantial part thereof"; and s. 2, sub-s. 1, says: "Copyright in a work shall be deemed to "be infringed by any person who, without the consent of "the owner of the copyright, does anything the sole right "to do which is by this Act conferred on the owner of the "copyright." If this last provision be applied to a painting which contains two or more "substantial parts," say a "Conversation Piece" by Hogarth or Zoffany containing two figures or groups in it, or a pen and ink sketch by the late E. Segar which contained not only a "Popeye," but some other personality of equally ridiculous but different appearance, either of which could be extracted so as to form a "design capable of registration," clearly the copyright in that part of the picture which was extracted to make a design would continue to attach until that part was "used or "intended" for the excepted purpose just as effectively as the copyright in the other part of the picture, but, as soon as the part in question was devoted to the excepted purpose, and a fortiori when it was in fact multiplied, etc., although it had previously enjoyed the copyright protection of the 1911 Act, it would at once lose it.

In the present case, the plaintiffs, through their licensee, "reproduced a substantial part of their artistic work" in a three-dimension form, B1. Apart from s. 22, B1 would, under s. 1, sub-s. 2, have had the benefit of the copyright of the original pen and ink sketch No. 3 and a reproduction by others without the plaintiffs' consent would have been an infringement within s. 2, sub-ss. 1 and 2, but B1 when made was not merely a reproduction of a substantial part

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of the copyrighted sketch, it was also a "design" within s. 93 of the Designs Consolidated Act and, therefore, capable of being registered under that Act so as to come within the first provision of s. 22 of the Copyright Act, 1911; and, as the plaintiffs, by their licensees, also used it and intended it to be used as a model or pattern to be multiplied by industrial processes, etc., it came within the second provision of s. 22 and that reproduction then fell out of the protection of the Act of 1911.

For these reasons I agree with the judgment of my brother Clauson. The order of the Court will be as stated by him.

*Appeal allowed.*
*Leave to appeal to House of Lords.*

Solicitors: *Derick R. Martin & Co.; Shaen, Roscoe, Massey & Co.*

H. C. G.

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1940
July 23.

## *In re* TAYLOR.

## MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* SMITH.

[1940. T. 115.]

THIS was an appeal from a decision of Farwell J., reported ante, p. 481, where the facts are fully set forth. The appeal was lodged by the widow of the testator.

The appellant and the members of the committee of the fund came to an agreement before the case was heard, and the appeal was dismissed by consent.

*H. B. Vaisey K.C.* and *A. Guest Mathews* for the appellant.

*J. Neville Gray K.C.* and *G. Maddocks* for the executor and trustee of the will.

*Charles Harman K.C.* and *Edward Ackroyd* for members of the committee of the fund.

*Appeal dismissed.*

Solicitors: *H. E. Quick; Norris, Allens & Co.; W. P. Davies & Son.*

P. J. B.

# *In re* HENDERSON'S CONVEYANCE

AND

# *In re* LAW OF PROPERTY ACT, 1925.

FARWELL J.

1940

July 8.

[1940. H. 970.]

*Covenant—Restrictive covenants—Modification—Covenant to leave land unbuilt upon—Imposed for benefit of adjoining house—Purchase of land with notice of restriction—No material change in property or neighbourhood—Residential amenities—No ground shown for discharge or modification of covenant—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 84.

In 1918 S. purchased a house with a large and attractive garden facing Wimbledon Common. The house was conveyed to him with the benefit of a covenant not to erect any building upon an adjoining piece of land lying at the end of the garden. The covenant had been entered into by a purchaser of this and other land from the common owner in 1865.

In 1938 B. purchased this plot together with other adjoining land which was free from any restriction and applied to the official arbitrator under s. 84 of the Law of Property Act, 1925, for a discharge or modification of the restriction, so as to enable him to build a house on the land. The arbitrator made an award permitting B. to build a house upon part of the land subject to payment of 500*l.* compensation to S. S., who had opposed the application, appealed to the Court :—

*Held*, that the award must be set aside. The section was not designed to enable a person to expropriate the private rights of another for his own profit, and the present was not a proper case for its application. There was no evidence of any change in the character of the property or of the immediate neighbourhood, which remained a high-class residential neighbourhood. The respondent B. had failed to show that the continued existence of the restriction would impede the reasonable development of the land, as he could build a house upon the land adjoining and use the land subject to the restriction for his garden. On the other hand the preservation of the land unbuilt upon was of value to S., as it increased the value of his property.

APPEAL and cross-appeal from an arbitrator's award under s. 84 of the Law of Property Act, 1925.

By a conveyance dated March 25, 1865, made between Joseph Wright and William Williams, Joseph Wright for himself, his heirs and assigns, covenanted with William Williams, not without the consent of Williams or other the owners of a house then known as Parkside, Wimbledon Common, to erect or build any building on certain land therein described and coloured green on the plan annexed, being a piece of land at the bottom of the garden of Parkside. Dr. R. J. S. Seligman, the appellant, purchased Parkside, now known as Lincoln House, for his own occupation, from the executors of Williams in 1918, together with the benefit of the above covenant. The garden of Lincoln House was about four acres in extent. In 1938, the respondent, Sydney Buckenham, purchased the land subject to the above restriction, together with adjoining land, all fronting on Bathgate Road, Wimbledon, and formerly the property of William Williams. The adjoining land had been sold in 1857 subject to a covenant to build only one house upon it. This house, named Somerset Lodge, had been pulled down, the covenant had been released, and two smaller houses built upon part of the land.

The respondent, Sydney Buckenham, applied under s. 84 of the Law of Property Act, 1925, to the official arbitrator for an order that the restrictions contained in the conveyance of 1865 might be discharged or modified to the extent of permitting one house, costing not less than 3000*l.*, to be built upon the land subject to the covenant of 1865. The application was opposed by Dr. Seligman, who gave notice of objection.

On February 19, 1940, the official arbitrator, Mr. Frank Hunt, made an award that the restrictions be modified to the extent of permitting the erection of a house with garage accommodation, not exceeding 40 feet in height to the roof, and that the respondent Buckenham should pay Dr. Seligman 500*l.* compensation. The proposed house would be 670 feet distant from Lincoln House. Dr. Seligman appealed, and S. Buckenham entered a cross-appeal against the payment of compensation.

*H. B. Vaisey K.C.* and *H. Heathcote-Williams* for the appellant. The arbitrator's decision was wrong in law. The evidence shows that there has been no change in the property or in the neighbourhood to justify any modification or discharge of the restriction upon this land. It was imposed for the express benefit of Lincoln House, which is the only "neighbourhood" for the purpose of s. 84. It is not open to a person who has subjected land to a covenant, or his assigns, to alter conditions and then say that the conditions have been altered. The restriction is not obsolete and does not impede any development of land. The respondent can build his house on part of the adjoining land, where there is room to do so, and use this land as a garden. The Wimbledon Common area was in 1865, and still remains, a high-class residential neighbourhood, though modern houses are smaller than Lincoln House.

*G. D. Squibb* (for *Arthur Capewell*, on war service) for the respondent. There has been sufficient change in the neighbourhood to justify the removal of the restriction, as is shown by a comparison of the sheets of the ordnance map at different dates. A restriction like this preventing any building on a piece of land of this size, ought not to be kept alive because of the wishes of one man living in a single house. Mr. Buckenham proposes to build a house of reasonable size, and use the rest of the land as garden. There is no evidence that Lincoln House as a building site for a block of flats in the future is in any way affected by the possible building of another house. The appellant has suffered no loss. Loss means loss as a landowner and does not refer to personal objections.

FARWELL J. This is an appeal from an award made by the official arbitrator under s. 84 of the Law of Property Act, 1925. The official arbitrator made his award on February 19 of this year. The appellant here was the respondent on that application.

Under s. 84 of the Law of Property Act, 1925, the Authority, which is therein defined, "shall (without prejudice to any "concurrent jurisdiction of the court) have power from time "to time, on the application of any person interested in any "freehold land affected by any restriction arising under "covenant or otherwise as to the user thereof or the building "thereon, by order wholly or partially to discharge or modify "any such restriction (subject or not to the payment by the "applicant of compensation to any person suffering loss in "consequence of the order) on being satisfied—(*a*) that by "reason of changes in the character of the property or the "neighbourhood or other circumstances of the case which the "Authority may deem material, the restriction ought to be "deemed obsolete, or that the continued existence thereof "would impede the reasonable user of the land for public or "private purposes without securing practical benefits to "other persons, or, as the case may be, would unless modified "so impede such user." I need not read (*b*). Then (*c*) is: "that the proposed discharge or modification will not injure "the persons entitled to the benefit of the restriction." Then there is a proviso with regard to the compensation to be payable. Then sub-s. 2 provides: "The court shall have "power on the application of any person interested—(*a*) To "declare whether or not in any particular case any freehold "land is affected by a restriction imposed by any instrument; "or (*b*) To declare what, upon the true construction of any "instrument purporting to impose a restriction, is the nature "and extent of the restriction thereby imposed and whether "the same is enforceable and if so by whom." Then sub-s. 4 provides for rules being made. The Authority is defined in sub-s. 10: "In this section 'the Authority' means such one "or more of the Official Arbitrators appointed for the purposes "of the Acquisition of Land (Assessment of Compensation) "Act, 1919, as may be selected by the Reference Committee "under that Act."

There have been certain rules made under that section of the Act, to which I will shortly refer. Order LIV.D, r. 1, provides that there shall be a right of appeal from an award. Rule 2 provides: "Every appeal from the Minister under "that Act shall be instituted in the Chancery Division of the "High Court of Justice by originating notice of motion "and shall be heard and determined by a single Judge "nominated from time to time either generally or in any "particular instance by the Lord Chancellor." Under that rule, I am the judge who is nominated to deal with these matters.

Rule 3 provides: "There shall be a right of appeal from "any order under section 84 of the Law of Property Act, 1925."

Rule 8 provides: "The determination of every appeal "under this order shall be final unless leave to appeal is given "by the Court determining the same or the Court of Appeal." There are other rules to which I need not refer.

As I understand it, the duty of this Court in dealing with these matters is, so far as necessary, to rehear the application. I apprehend that under the rules, if the Court thinks it necessary, it can require witnesses to attend and give oral evidence. Generally speaking, the matter is dealt with upon such facts as were brought before the official arbitrator. In considering his award, the Court has in mind that the official arbitrator is a person who has particular knowledge of the sort of matters which are dealt with under this section, and the Court would be slow, I think, to interfere with his decision unless it was satisfied that the official arbitrator had not given proper consideration to material facts, or had omitted to consider material facts, or had misunderstood the function which he had to fulfil, or had misconstrued the section of the Act. Generally speaking, in these matters, at any rate so far as any technical question is concerned, the Court would be slow to interfere with the award of the official arbitrator, but the Court has power to make such order as it thinks fit if the official arbitrator has come to a conclusion with which the Court does not agree.

In the present case the applicant is a gentleman who purchased, in 1938, a piece of land close to Wimbledon Common. It is a piece of land on which there was originally a house known as Somerset Lodge. That was a house of some size, and the property included a piece of ground which was used, or had been used, as a garden. The piece of land extends for some distance, and a portion of it abuts immediately upon a piece of ground which is the property of the appellant on this appeal, Dr. Seligman.

Dr. Seligman purchased his property as long ago as 1918. On it there is a house of considerable size and it abuts immediately upon a road known as Parkside, on the opposite side of which stretches Wimbledon Common. The appellant's property is a stretch of land running from Parkside down towards Bathgate Road and Seymour Road. The house is at the end nearest Parkside. The house is a large one and it opens on to a narrow but attractive garden, as appears from the photograph which I have seen. The garden has apparently some fine trees in it. There is a bathing pool and a tennis court, and in addition to that the appellant has expended considerable time and money in making a very attractive garden of Alpine flowers. He has apparently made a speciality of alpine plants and there are many in his garden which are rare and as he thinks of an interesting nature. At the far end of the garden, at the end furthest from Parkside, there comes the piece of land which is included in the respondent's property. That piece of land is, judging from the photographs, apparently rather a wild piece of garden, sloping upwards, and it gives no doubt a pleasant vista from the house and garden of the appellant, and prevents, so long as it is not built upon, the garden of the appellant from being overlooked.

The appellant purchased his property, as I have said, in 1918, from the executors of Mr. William Williams, who was a well known solicitor. Mr. Williams lived there for many years, and after his death his widow continued to reside there. Finally, after his widow's death, the executors, or the trustees with the consent of the executors, sold the property to the present appellant. I should add this. Originally, Mr. Williams was the owner both of the appellant's property and that which is now the property of the respondent. The house, Somerset Lodge, which originally stood on the respondent's property, and the land, was let by Mr. Williams on a twenty-one years' lease with an option to purchase. That option was exercised, and the piece of land in question and the house was purchased by the predecessors of the respondent. The house itself is no longer there; it has been pulled down. Under some arrangement with Mr. Williams, two smaller houses were erected, on a different part of the property; but until the sale of Somerset Lodge and the land belonging to it, Mr. William Williams, the predecessor of the appellant, was the owner of that portion of the land as well as the land which is now the property of the appellant.

When the appellant purchased his property, it was conveyed to him by a conveyance of December 20, 1918, made between Charles Bridgewater Williams and Walter George Gates, who were the trustees under the will, and certain other persons who were the executors under the will, and the appellant. The conveyance recited the will of William Williams and his death, and that at the time of his death he was "seised of the hereditaments hereinafter "described for an estate of fee simple in possession subject to "certain covenants and provisions restrictive of the user of "that part of the said hereditaments coloured blue on the "plan," and so on. The operative part of the conveyance is: "In pursuance of the said agreement and in consideration of "the sum of 5500*l.* now paid by the purchaser to the vendors "as such trustees as aforesaid (the receipt of which sum the "vendors hereby acknowledge) the vendors as trustees hereby "convey unto the purchaser all those pieces of land situate "in the parish of Wimbledon in the county of Surrey containing "in the whole 3 acres 3 roods or thereabouts formerly part "of the Wimbledon Park estate together with the messuage "and buildings thereon known as Parkside and more particu-"larly delineated on the plan drawn on these presents and "thereon coloured pink and blue and together with the benefit "of the covenants by Joseph Wright against building and "other covenants contained in an indenture dated the 25th "day of March 1865 and made between the said Joseph Wright "of the one part and the said William Williams of the other "part to hold unto and to the use of the purchaser in fee "simple" and so on.

By that conveyance the appellant became the owner in fee simple of this piece of land—the house being now known as Lincoln House—the house and the garden adjoining thereto, together with the benefit of a covenant which was contained in the deed of March 25, 1865. It is necessary, therefore, to look at that deed to see what the covenant was. That deed, dated March 25, 1865, is made between Joseph

Wright of the one part and William Williams of the other part. It recites the lease of Somerset Lodge " together with "the stables coach house and outbuildings thereto adjoining "then lately erected by the said William Williams on a plot "of ground situate in Somerset Road Wimbledon Park in the "County of Surrey together with the gardens and piece of "meadow or pasture ground " and so on. Then it recites that " it was agreed and declared between and by the parties "thereto that if the said Joseph Wright his executors administrators or assigns should on or at any time before the 25th day "of February 1865 " give notice in writing signed by him or them to the vendor of the exercise of the option, then that he should have the right to purchase it for the price therein named, and in further consideration of the covenant which is contained in the deed and by that deed the property was conveyed to the respondent's predecessor in title. The covenant is in these terms. The said purchaser " doth hereby "for himself his heirs executors administrators and assigns "covenant with the said William Williams his heirs executors "administrators and assigns in manner following that is to "say that he the said Joseph Wright his heirs or assigns will "not at any time hereafter without the consent in writing "under the hand or hands of the said William Williams his "heirs or assigns being the owner or owners for the time "being of the messuage or tenement called ' Parkside ' together "with the land belonging thereto shewn on the said plan "drawn on these presents erect or build any erection or building "whatsoever upon so much and such part of the piece of land "or ground demised by the hereinbefore recited indenture of "lease and so purchased as aforesaid as lies between the two "lines hereinafter referred to." Those lines are shown on the plan annexed to the deed. The piece of land upon which that restriction was imposed was a piece of land which abutted immediately upon the appellant's garden, between the end of his garden, the end furthest from Parkside, and what is called on the plan " New Park Road," now Bathgate Road. That covenant which was entered into in 1865 is a covenant which has been observed ever since, with the result that

Mr. William Williams and his widow, and after them the appellant, have had the advantage which was to be gained from the existence of that covenant, namely, that there was an unbuilt-upon space at the bottom of the appellant's garden which not only extended the view from the garden and the house, but also prevented any one from overlooking the garden of the appellant.

In 1938, the respondent purchased his piece of land together with another portion of land. Having bought it, he desired to erect a house upon that portion of the land which is subject to the restrictive covenant. It is not suggested that it is not possible for the respondent to erect a house upon the land which he has acquired avoiding the portion which is subject to the restrictive covenant, but it is said that the respondent does not desire to erect his house there because it would be in close proximity to the two smaller houses which have been erected, and that it is therefore not a desirable site, and in his view the proper position for a house to be erected on his piece of land is upon this portion of it which is subject to the restriction.

When the appellant heard what the desire of the respondent was, he offered to purchase the piece of land from him at a price which would give the purchaser a considerable profit, but the respondent was not prepared to entertain any such proposal. He bought his property with full notice of the restrictive covenant, and it is not suggested that he was not fully aware of it at the time of the purchase. Therefore, he was unable to erect his house where he desired to erect it, unless he could get the covenant which affected that portion of the land removed under the section of the Act. This application to the official arbitrator was an application to have the restriction on building on this piece of land removed, so that he might be free to build in what he thought was the most desirable place on the property to erect his house.

The appellant objected to the restriction under the covenant being disregarded. He opposed the application before the official arbitrator and sought to have the application dismissed on the ground that it was not a case in which the restriction ought to be modified or removed.

The official arbitrator has come to the conclusion that the respondent is entitled to have the covenant removed or at any rate modified " to the extent of permitting the erection "on a portion of that part of the aforesaid land tinted light "green on the aforesaid plan of a private dwelling house with "garage accommodation for the use of the occupier of the "said dwelling house, such dwelling house to be of a height "to the ridge of the roof of not exceeding 40 feet." He further came to the conclusion that the appellant in this Court was entitled to compensation in the sum of 500*l.* for the removal or modification of the covenant. Accordingly the applicant, the respondent here, was ordered to pay 500*l.*, together with a sum in respect of costs.

That award having been made, the appellant gave notice of appeal within the time limited by the rules. His notice of appeal, which contains the reasons why he contends that the award should be set aside, which again is in accordance with the rules, states " that the grounds of this appeal are: "(1.) That there are no changes in the character of the "property or the neighbourhood or other circumstances of the "case which should have been deemed by the said authority "as material, by reason whereof the said restrictions ought "to be deemed obsolete. (2.) That the continued existence "of the said restrictions unmodified does not impede the "reasonable user of the said land for public or private purposes "without securing practical benefits to other persons." Then I need not read (3.). (4.) is : " That the proposed modification "will seriously injure the" appellant " being the person "entitled to the benefit of the said restrictions by interfering "with the amenities of his property for the benefit and "protection of which the said restrictions were imposed and "are still necessary. (5.) That having regard to the nature "and history of the said restrictions and the circumstances "and date of the acquisition of the said land by" the respondent " the case is not one where any modification of "the said restrictions ought to be ordered."

That notice of appeal having been given, the respondent in this case also served notice of appeal, but his notice of appeal was out of time. I think it was a few days late. I am asked, notwithstanding that it is out of time, to entertain his appeal. He is appealing against so much of the award as awarded 500*l*. as compensation to the appellant, on the ground that the appellant is not a person suffering loss in consequence thereof. His contention is that although the official arbitrator came to the right conclusion so far as the modification of the covenant is concerned, he ought not to have given the appellant any sum by way of compensation, because the appellant has not suffered any loss or damage by the modification of the restriction.

Under those circumstances, I have to consider whether the award of the official arbitrator is correct. It is, I think, noticeable that the application in this case is not quite of the usual order. Most of the cases under this section are cases in which there are in existence restrictive covenants which are likely to or actually do impede or prevent the proper development of adjoining property. In most cases they are covenants which, having regard to the present times and the changes which are required from time to time in the use of property, have become obsolete or are of such a hampering nature that they prevent any proper development of the adjoining property. In cases of that sort the Court has to consider whether the restrictions are such as can be properly and justly modified or released, and whether there is a real necessity, in order to enable the proper development of the neighbouring property, that there should be some modification or removal of the restrictions in question. This is not a case of that sort. This is purely a question between two private owners, one of whom desires to erect a house on a particular portion of his property, and the other of whom desires to keep that which he has long enjoyed and that for which presumably he paid when he acquired his house and grounds, namely, the benefit of having at the bottom of his garden an open space, a space which, so long as the covenant remains, will be always an open space, and one which, being an open space, will not have upon it a dwelling or dwellings from which his garden can be overlooked. It is not a case where the applicant before the official arbitrator was seeking to develop his land for some purpose such as erecting small houses thereon, or shops. It is a question whether the personal benefit which may result to him from being able to put his house on a particular part of his property is sufficient to justify him in asking that the benefit under the covenant which the appellant has long enjoyed shall be taken away from him.

Speaking for myself, I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind; but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes. I do not think the section was designed with a view to benefiting one private individual at the expense of another private individual. At any rate, primarily, that was not, in my judgment, the object of this section. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value.

In the present case the respondent bought this piece of land with full notice that he was under a restriction against building on a particular portion of it. As I have said, it is not suggested that it is impossible to build a house upon a portion of the land which he has acquired without in any way interfering with the restrictions upon this particular portion of it. Therefore, it seems to me that the respondent must bring himself strictly within the terms of the Act if he is to make a case which will justify the release or the modification of this covenant.

If one turns to the Act, it is apparent what he has got to show. He has to show that by reason of changes in the character of the property the restriction ought to be modified. In the present case it does not seem to me that there has been any change in the character of the property. The property has been for many years a house occupied as a private residence with a considerable garden of an attractive nature and with the benefit of an open space at the foot of the garden over this particular portion of land, and although the appellant is not at the moment actually living at the house (I think it has been occupied by refugees, having been lent by the owner for that purpose), he is proposing to take up his residence there again very shortly. The character of the property has been completely unchanged for many years—during all the time that Mr. William Williams himself lived there, during the time his widow lived there, and since 1918 when the appellant bought it.

In my judgment, there is nothing whatever in the evidence to suggest that there has been any change in the character of the property.

The next requirement which the Act imposes is " by reason "of changes in the character of . . . . the neighbourhood." No doubt in Wimbledon Common, as in many other places, there has been and there is a tendency no longer to make use of the somewhat large private houses which one finds on Wimbledon Common. There has been a tendency to erect smaller houses in place of the somewhat larger houses which originally, in more spacious times, people in the position of the present appellant desired to occupy. But there is nothing whatever, so far as I can see in the evidence before me, to suggest that the neighbourhood is not still a high-class residential neighbourhood. No doubt the size of the houses is smaller, and where there was one large house there may now be two small houses; but that the character of the neighbourhood has altered does not seem to me to be proved in any degree at all, so far at any rate as the immediate neighbourhood of this house is concerned. So far as I can see from looking at the maps to which my attention has been called, the character of the neighbourhood remains the same, that is to say, a high-class residential neighbourhood.

In my judgment, the applicant before the official arbitrator did not satisfy the first requirements of this section, because he did not succeed in proving either a change in the character of the property or of the neighbourhood.

Then the section provides, "or other circumstances of the "case which the authority may deem material." What other circumstances there could be in this case, I do not really appreciate. Certainly it was suggested before the official arbitrator that there had been a change in the neighbourhood, but that there were any other circumstances it does not seem to me has been proved at all.

Then the section continues, still referring to the restriction, "or that the continued existence thereof would impede the "reasonable user of the land for public or private purposes." The continued existence of this restriction clearly will not impede the reasonable user of the land for public purposes, because it is not suggested that the respondent is intending or ever has intended to use his land for public purposes. His object, and his only object, so far as the evidence shows, was to buy this portion of land for the purpose of erecting a dwelling-house upon it and there is no evidence that the covenant impedes the reasonable user of the land for public purposes.

Then the next words are words which might be important, "or private purposes." There is no doubt that the erection of a dwelling-house in a case of this sort is for private purposes, and no doubt the existence of this restriction will impede and does impede the erection of the respondent's house upon the particular part of the property upon which he desires to put it; but the continued existence of the restriction does not impede in any way the erection of a house upon part of the land which the respondent bought.

Then the section proceeds, "without securing practical "benefits to other persons, or, as the case may be, would "unless modified, so impede such user." It is said that the appellant here is getting no practical benefit from the enjoyment of this covenant. In my judgment that is not so. In my view it is a practical benefit to the owner of property to have an open space, and a space which must be kept an open space, in the immediate neighbourhood of his property. Apparently when Mr. William Williams imposed this covenant on the purchaser of the adjoining land, he thought there was a benefit in taking the covenant which he did take. In my view, if there was a practical benefit in getting an open space in those days—that is in 1865—there is an even more practical benefit in securing an open space in these days, when the number of open spaces in the immediate vicinity of London is rapidly becoming less and less. Moreover, I think there is a practical benefit in having a garden which is not overlooked by a house or houses immediately adjoining it. Here there is a bathing pool and a tennis court. Although it may not be a very valuable asset, it is a practical benefit, that persons can use a bathing pool and play tennis on the tennis court without the possibility of people from a neighbouring house watching their movements all the time. Although, as I say, that may not be of very great value, it is, in my judgment, of some value to the owner of the property, and in the case of his desiring to sell or let the property, would be an amenity which might well enhance to some extent the value of the property as a whole.

It is said, if and when the present appellant is either, by reason of his death or otherwise, no longer in possession of this property, there is no likelihood of the property being lived in again by a private individual, and the probability is that it will be sold as building ground for buildings to be erected upon it. If and when the day comes when that situation arises, and it is proposed to erect smaller houses on the land which is now the appellant's land, it may be then reasonable enough that this restriction upon the adjoining property should go; but so long as the property is in the ownership of the present owner and the adjoining property is the property of the respondent, it seems to me that this is simply an attempt to avoid the obligations of a covenant which were perfectly well known to the respondent at the time that he bought his property, merely in order to enable him to get a benefit by erecting his house in the place where he wants it erected, at the expense of the appellant who is being made to give up what is, in my view, a benefit of some value which he is entitled to enjoy.

In my judgment, the applicant before the official arbitrator failed to satisfy the requirements of the section, and the official arbitrator should have come to the conclusion that there was no ground for modifying in any way the existing covenant the benefit of which the appellant in this Court was enjoying, and that he should therefore have refused to make any award.

In my judgment, the proper order to make in this case is to set aside the award and to order the respondent to pay the costs.

Solicitors: *Lewis & Yglesias; E. P. Rugg & Co.*

H. L. L.

## *In re* GORDON.

SIMONDS
J.

1940
July 9.

## LLOYDS BANK AND PARRATT *v.* LLOYD AND GORDON.

[1940. G. 367.]

*Friendly society—Rules—Construction—Payments for benefit of widow—Valid trust established by rules—Widow entitled to benefits.*

On the death of a testator who was a member of the Society for the Benefit of Widows of the Officers of the Royal Regiment of Artillery, his widow became entitled, under the Society's rules, to immediate payment of a certain sum and, so long and during such periods as she was a widow, to a pension. Also, the testator had by deed provided an annuity for her, and she had certain interests under his will.

The question arose whether the widow was entitled to keep for her own benefit, in addition to the annuity and the testamentary interests, the moneys receivable by her from the society in respect of the testator's payments to it, or had to hold them as part of his estate on trust for his personal representatives:—

*Held*, (1.) that the answer to the question depended on whether, on the true construction of the rules, there was a trust for the widow's benefit: that in every case the question is whether, on the true construction of the relevant deed or other document, there is a trust for third parties (in the present case the widow) or simply a contract between the parties (in the present case the testator and the Society); and that where there is a trust the third parties can enforce it;

(2.) that, on the true construction of the rules, there was a valid trust in favour of the widow, who was accordingly entitled to the capital sum and the annuity which the rules provided for.

*Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147; *In re Engelbach's Estate* [1924] 2 Ch. 348, and *In re Sinclair's Life Policy* [1938] Ch. 799, distinguished.

ADJOURNED SUMMONS.

Sir Alexander Hamilton-Gordon (hereinafter called "the "testator") was a member of the Society for the Benefit of the Widows of the Officers of the Royal Regiment of Artillery. The society's rules referred throughout to that to which widows were "entitled."

Rule 2 was: "The objects of the society shall be to support "and maintain the widows of members, and to assist orphan "children of members."

Rule 3 was: "The name of the society is 'The Society for "'the Benefit of the Widows of the Officers of the Royal "'Regiment of Artillery.'"

Rule 23 was: "Every future member in the married class, "not having been in the unmarried class, shall, whilst continuing in the married class, pay a quarterly subscription by "way of contribution to the funds of the society regulated by the "respective ages of himself and his wife, . . . . in accordance "with the rules, in order to entitle his widow to a sum on his "death, and a pension during her widowhood, . . . ."

Rule 25 was: "It shall be obligatory upon every member "hereafter joining the married class to pay a quarterly "subscription of such amount as to entitle his widow to a "pension during her widowhood . . . . as previously authorised "by the rules registered in 1890."

Rule 72 was: "The widow of every member in the married "class, continuing to be a member in such class till the time "of his death, shall be entitled on her husband's death to a "gratuity equal to one year's payment of the pension for "which he subscribed, and to the quarterly payment in arrear "of a fourth part of such pension during her life, and, in the "event of her death before or after that of her husband, the "pension may be paid for the benefit of any children she may "leave, such children being also the lawful issue of the said "subscriber, until the youngest of such children shall attain "the age of 21 years. The decision of the committee as to "the amount of pension or gratuity payable shall be conclusive "and final."

Rule 76 was: "The pension of every widow shall be "treated and considered as accruing due and payable to her "from the date of her husband's death up to the day of her "own death, and shall be paid to her quarterly."

Rule 80 was: "In case any widow entitled to a pension "shall become incapable from mental or bodily disease or "infirmity to give a valid receipt for any sum of money payable "to her on account thereof, the same may be paid and applied "to or for her use or benefit, as the committee shall, in their "discretion, from time to time direct."

Rule 82 provided: "The property and funds of the society, "and generally all its personal estate, and also all its real "estate (if any) though legally or actually vested in or being "in the actual or legal custody, possession, dominion, power "or control of the trustees, shall be administered, dealt with, "and disposed of by or under the control and according to "the order and direction of the committee and the general "meetings, subject to and in accordance with the rules."

By a deed dated September 27, 1922, the testator provided an annuity for his wife, and he made his will on January 2, 1936, and a codicil thereto on January 21, 1937. He died on February 13, 1939, whereupon his widow became entitled, under the society's rules, to 164*l.* immediately, and to a pension of 82*l.* a year so long and during such periods as she was a widow. In the events which happened, the testator's residuary estate was directed by the will to be held on trust for the widow for her life, and, after her death or re-marriage, on trust for the testator's daughter Mrs. Eileen Lloyd absolutely.

Questions arose on the administration of the testator's estate, and by this summons, issued on February 14, 1940, his personal representatives, Lloyds Bank, Ld., and Mr. Ralph Heather Parratt (hereinafter called "the plaintiffs") asked, by an amendment (inter alia) whether the widow could keep for her own benefit (in addition to the annuity and to her interests under the will) moneys receivable by her from the society in respect of the testator's payments to it, or had to hold them, as part of his estate, on trust for the plaintiffs.

The estate was not sufficient to pay the annuity from income, and the widow claimed to have it made up to her out of capital. The daughter contended that the pension ought to be taken into account in calculating the annuity, and that the widow was not entitled to have the annuity made up out of the capital of the estate but was entitled to income only.

*G. D. Johnston* for the plaintiffs.

*C. D. Myles* for the daughter. Where there is simply a contract between two parties, even though what is contracted to be done is done for the benefit of third parties, the third parties have not the right to enforce the benefits. *Cleaver* v. *Mutual Reserve Fund Life Association* (1); *In re Engelbach's Estate* (2); *In re Sinclair's Life Policy.* (3) In *Ashby* v. *Costin* (4) the rules were very special. There was a discretionary trust, and the case was quite different from the present case. [He referred to *In re Davies* (5) and *Bennett* v. *Slater.* (6)] Here, on the true construction of the rules, there is no trust for the widow's benefit, and, accordingly, she must hold the moneys receivable by her from the society in trust for the plaintiffs.

*Wilfrid M. Hunt* for the widow. *In re Engelbach's Estate* (2) and the cases like it have no application here. On the true construction of the rules there is a valid trust in favour of the widow. She has a right, and, if she wishes to enforce it, she can do so by claiming under the rules. She is entitled to keep for herself the moneys receivable by her from the society.

*J. A. Reid* held a watching brief for the society.

SIMONDS J. The testator was a member of the Society for the Benefit of the Widows of the Officers of the Royal Regiment of Artillery. He paid his first subscription as long ago as January 9, 1888, and according to the rules of the society, his widow, who is a defendant to these proceedings, became on his death entitled to immediate payment of a certain sum, and to a pension of a certain amount so long as she remained his widow. The testator died on February 13, 1939. The question has been raised whether, notwithstanding that prima facie it is she who under the rules becomes entitled to that capital sum and that pension, she is entitled to retain them for her own interest. The answer to that question must depend upon whether, on the true construction of the rules, one can find a trust established for her benefit. If there is a trust this case is removed altogether from the

(1) [1892] 1 Q. B. 147.
(2) [1924] 2 Ch. 348.
(3) [1938] Ch. 799.
(4) (1888) 21 Q. B. D. 401, 402.
(5) [1892] 3 Ch. 63.
(6) [1899] 1 Q. B. 45.

authority of such cases as *Cleaver* v. *Mutual Reserve Fund Life Association* (1); *In re Engelbach's Estate* (2), and *In re Sinclair's Life Policy.* (3) Upon a reading of these rules it seems to me clear that there is a trust established of the society's funds to be administered by the society or by trustees in whom the funds are vested in accordance with the rules, and that anybody to whom, under the rules, a benefit is given is to be regarded as a beneficiary entitled to enforce his rights as such beneficiary. The society is registered under the Friendly Societies Act. Its name is, I think, indicative of its character; it is the Society for the Benefit of the Widows of the Officers of the Royal Regiment of Artillery. Its object is by r. 2 stated to be to support and maintain the widows of members, and to assist orphan children of members. The members of the society are to be, according to the present rules, the present members and other persons who shall from time to time become and continue to be members in accordance with the rules. One finds that the persons who may become members are officers of the Royal Regiment of Artillery. Then the rules provide for the retirement and expulsion of members, for their subscriptions, and what their subscriptions are to produce. One finds that members of the unmarried class, who leave when they die neither a widow nor children, in effect make a contribution to the funds for the benefit of other members of the society. One finds, too, that the society can receive donations for the advantage of members. Members of the married class pay their subscriptions on the footing that pensions of a certain size will be payable to their widows on their death. Throughout the rules are references to that to which the widow is entitled. Finally comes r. 82, which appears to me to be conclusive, and which provides: [His Lordship read it and continued:] It appears to me that those are words which are apt to establish a trust. In every case it is a question of construction, as it was in the case referred to where what had to be construed was a partnership deed. In every case

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(1) [1892] 1 Q. B. 147.
(2) [1924] 2 Ch. 348.
(3) [1938] Ch. 799.

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it is a question whether a trust is established, or whether there is nothing more than a contract between the parties to the deed. Where, as here, there is a trust established, whatever rights are created for third parties by the deed can be enforced by those persons in whose favour they are so created.

I think that, in this particular case, there is a valid trust created in favour of the testator's widow who, accordingly, is entitled to the capital sum and to the annuity which the rules provide.

Solicitors: *Fladgate & Co.; Peacock & Goddard; Dawes & Sons; Ellis, Peirs & Co.*

K. R. A. H.

# *In re* AN APPLICATION BY THE ROYAL BANK OF SCOTLAND.

BENNETT J.

1940 July 9.

[1940. R. 1253]

*Mortgage—Notice by mortgagees calling in moneys—Three months not expired—Application by mortgagees for leave to exercise powers—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 103—*Courts* (*Emergency Powers*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1.

On May 15, 1940, the mortgagees of certain freehold land served on the mortgagor notice under s. 103 (i.) of the Law of Property Act, 1925, requiring payment of the mortgage money, and on May 29, 1940, they applied under the Courts (Emergency Powers) Act, 1939, for leave on the expiration of three months from May 15, 1940, to exercise all the powers or remedies available to them:—

*Held,* that, as the mortgagees were not yet in a position to realize their security, and as the time at which the Court had to consider whether a mortgagee was unable immediately to perform his obligations within s. 1, sub-s. 4, of the Act of 1939, was that at which the mortgagees would be entitled but for that Act to exercise their remedies, the application was premature and should be adjourned till after three months had expired from the date of the notice.

PROCEDURE SUMMONS.

By an equitable charge dated June 5, 1936, Ezekiel Elia Shamoon (hereinafter called "the mortgagor") charged certain freehold land with the payment of certain moneys due from him to the Royal Bank of Scotland (hereinafter called "the mortgagees"), the title deeds being deposited with them by way of collateral security. It was provided that the mortgagees should "have all the powers conferred "on mortgagees by the Law of Property Act, 1925, in like "manner as if these presents had been a mortgage by deed." On May 15, 1940, the mortgagees formally demanded repayment, calling in all moneys due to them under or by virtue of the charge. On May 28, 1940, they applied under the Courts (Emergency Powers) Act, 1939, for leave, on the expiration of three months from May 15, 1940, to proceed to exercise all powers or remedies which might be available to them, and particularly that to enter into possession of and sell the property charged.

*Markwick* for the mortgagees. Notice has been served under s. 103 (i.) of the Law of Property Act, 1925 (1), and on August 15, 1940, the mortgagees will be in a position to exercise their remedies. The Court in considering an application under the Courts (Emergency Powers) Act, 1939, will not consider whether or not those remedies are immediately exercisable: *In re an Application by the Huddersfield Building Society.* (2)

*Pennycuick* (*Coen* with him) for the mortgagor. As the mortgagees are not yet in a position to realize their security this summons is premature. The Court must consider the matter when the remedy is exercisable.

Bennett J. [having stated the facts :] Upon the face of the charge which is the foundation of this application, the Bank are not at the moment in a position to realize the security and they will not be in a position to do so until August 15, 1940. The relevant date at which the Court is to consider whether a respondent is unable immediately to perform his obligation must be that at which the person entitled, but for the Courts (Emergency Powers) Act, 1939, to exercise some remedy, is in a position to exercise it. The position of the respondent may entirely change between now and August 15, and that change may be due directly or indirectly to circumstances attributable to the present war. If on the present application I were to give leave to the applicant to exercise a remedy which is not exercisable until after August 15, I might be depriving the respondent of the rights which s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939, gives him. In my judgment this application made to-day is on the face of the Summons premature. It has been adjourned to me for the determination of the question which I have decided in favour of the respondent and, since I propose to adjourn it back to chambers with a direction that it is not to be restored until after August 15, it would, in my judgment, be right to order the applicant to pay the respondent the costs of the adjournment into Court. Accordingly I propose to make that order.

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(1) By the Law of Property Act, 1925, s. 103 : "A mortgagee "shall not exercise the power "of sale conferred by this Act "unless and until—(i.) Notice "requiring payment of the "mortgage money has been served "on the mortgagor . . . . and "default has been made in payment of the mortgage money, or "of part thereof, for three months "after such service . . . ."

(2) [1940] W. N. 247.

Solicitors: *Forsyte, Kerman & Phillips*; *Piesse & Sons.*

F. C.

BENNETT J.

1940

July 9.

# BROADSTAIRS PICTURE HOUSE, LIMITED *v.* LITTMAN.

[1939. B. 3804.]

*Vendor and purchaser—Contract for sale of land—Purchaser in possession—Non-compliance by purchaser—Judgment for specific performance—Non-compliance—Motion for rescission and forfeiture of deposit—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1.

The vendors of land under a contract of sale having recovered judgment for specific performance in an action against the purchaser, who thereafter failed to comply with the order of the Court, moved to have the contract rescinded and the deposit paid to them forfeited:—

*Held*, that they were not seeking "the enforcement of any "judgment or order . . . . for the payment or recovery of a "sum of money" within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, and that, accordingly, the purchaser was not entitled to rely on it.

MOTION.

By a written contract dated December 31, 1938, Broadstairs Picture House, Ld. (hereinafter called "the vendors"), agreed to sell, and Joseph Aaron Littman (hereinafter called "the purchaser") agreed to purchase certain land at Broadstairs for 5000*l.* The purchaser paid to stakeholders a deposit of 250*l.*, but on March 25, 1939, the date fixed for completion, he failed to complete, though he was then in possession of the land. On his paying a further 250*l.* deposit, it was agreed that the time for completion should be extended to June 24, 1939, but he failed to complete on that date. On October 11, 1939, the vendors commenced an action for specific performance of the contract, and having applied for judgment under R. S. C., Order XIV.A, they obtained a decree on December 18, 1939. It was thereby ordered that an account of what was due to them for the balance of the purchase money and of their taxed costs should be taken. It was further ordered that the purchaser should pay the vendors the sum certified to be that balance, and that the vendors should deliver him the conveyance, duly executed by them, together with all deeds, in their custody relating to the land. On April 3, 1940, the Master certified the sum due from the purchaser to the vendors, and appointed May 3, 1940, as the day for payment and delivery of the conveyance. The purchaser failed to complete on the day fixed.

By this motion the vendors sought an order that the contract be rescinded, and the deposit forfeited, and also that the purchaser should deliver up vacant possession of the land.

*A. G. Coulson* for the vendors. The order asked for should be made as a matter of course. The Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1, does not affect this case, because the vendors are not seeking to enforce any judgment or order for the payment or recovery of a sum of money.

*L. M. Jopling* for the purchaser. This case is within s. 1, sub-s. 1, of the Act, and if the purchaser can show that by reason of circumstances attributable to the war he is unable to perform his obligations (s. 1, sub-s. 4), the Court has a discretion to restrict the normal rights of the vendors, who by this motion are indirectly proceeding to execution on, or otherwise to the enforcement of, the judgment. In circumstances such as the present, rescission of the contract is a recognized form of relief after judgment for specific performance: Fry on Specific Performance, 6th ed., pp. 546-7, paras. 1171-3; Williams on Vendor and Purchaser, 4th ed., p. 1063.

BENNETT J. [having stated the facts:] The order which the plaintiffs seek on this motion is one which, but for the Courts (Emergency Powers) Act, 1939, would be made as a matter of course. That is not disputed, but it is said on behalf of the defendant that he is entitled to rely on sub-s. 4 of s. 1 of that Act, so that if he can show that he is unable immediately to perform his obligation by reason of circumstances directly or indirectly attributable to the war, this Court has a discretion to restrict what would otherwise be the plaintiffs' normal rights. In support of this it is contended that this case is within sub-s. 1 of s. 1 of the Act, though it is conceded, having regard to the decision of the Court of Appeal in *S. & A. Services, Ld.* v. *Dickson* (1) that it is not within the provisions of sub-s. 2. By sub-s. 1 of s. 1: "Subject to the provisions "of this section, a person shall not be entitled, except with "the leave of the appropriate Court, to proceed to execution "on, or otherwise to the enforcement of, any judgment or "order of any court (whether given or made before or after "the commencement of this Act) for the payment or recovery "of a sum of money . . . ." It is said, as I understand it, that in this case the plaintiffs are indirectly proceeding to execution on, or otherwise to the enforcement of, a judgment of the Court. I do not think they are doing anything of the kind. They brought their action for specific performance of a contract made before September, 1939. They obtained a decree by which the defendant was ordered specifically to perform it. Having obtained that decree they lost the right which they had under the contract to forfeit the deposit which the defendant had paid if they elected to put an end to the contract. After the decree they were bound to convey the property contracted to be sold and the defendant was bound to pay for it. So long as the decree remains, the plaintiffs cannot rescind the contract without the leave of the Court. The whole point of the motion is to put the plaintiffs into a position in which they will be able to deal with the property free from any rights of the defendant. The ground upon which the Court gives leave to forfeit the deposit appears to be that the defendant, in failing to perform the contract which he has been ordered to perform, is in contempt of Court. In the order they seek, the plaintiffs are not, in my judgment, proceeding to execution on, or otherwise to the enforcement of, any judgment or order for the payment or recovery from the defendant of any sum of money. This is a case which, in my judgment, does not fall within the language of sub-s. 1 of s. 1 of the Act. It therefore seems to me that the plaintiffs are entitled to the order for which they ask by their notice of motion.

(1) [1940] 2 K. B. 219.

I also declare that they can give a good discharge for the deposit in the hands of the stakeholders.

BENNETT J.

1940

BROADSTAIRS PICTURE HOUSE, LD. *v.* LITTMAN.

Solicitors: *Lovell, Son & Pitfield, for Robinson & Allfree, Ramsgate; Wigram & Co.*

F. C.

C. A.

1940

*April* 2, 3, 4;
*June* 21.

*Distinguished.*
STARKOWSKI *v.* ATT.-GEN.
[1952] P. 135

# *In re* LUCK'S SETTLEMENT TRUSTS.

# *In re* LUCK'S WILL TRUSTS.

# WALKER *v.* LUCK AND OTHERS.

[1939. L. 1352.]

*Legitimacy—Child born in California—Born out of wedlock—Father a British subject—Californian domicil subsequently acquired by father—Legitimation by declaration according to Californian law—Whether child entitled to take under trusts of English settlement.*

In 1906 a British subject, who was then married, became the father of an illegitimate son born in California, where he was then resident. He subsequently became domiciled there and in 1922 contracted a second marriage with a woman not the mother of his son, his previous marriage having been dissolved. In 1925 he signed a declaration, which in Californian law operated to legitimate the son from his birth, to the effect that he publicly acknowledged the child as his, that he had received him into his home with the consent of his wife, that he had in all respects treated him as if he were legitimate and that he thereby adopted him as such. After the death of his father in 1938 the son claimed to share in the funds settled respectively by the marriage settlement of his grandparents, the survivor of whom had died in 1898, and under the will of his grandfather, both documents taking effect according to English law. Under the marriage settlement and an appointment made thereunder the share settled on each of the children of the grandparents was ultimately divisible among all the children of that child born within twenty-one years after the death of the survivor of them and under the trusts of the will the share thereby settled on each of their children was ultimately divisible among all the children of that child who should attain the age of twenty-one years :—

*Held*, that as the father had not acquired a domicil of choice in California at the date of the son's birth, the declaration of adoption could not be taken by the English Courts to have rendered the son legitimate. The principle applied by the authorities in regard to legitimation by subsequent marriage applied here, and as by the law of the father's domicil at the date of the son's birth the relationship was immutably that of putative father and illegitimate child and nothing thereafter could change it, it followed that the son took no interest in either of the two trust funds.

So held by Sir Wilfrid Greene M.R. and Luxmoore L.J. (Scott L.J. dissenting).

Decision of Farwell J. (ante, p. 323) reversed.

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LUCK'S WILL TRUSTS, *In re.*
WALKER *v.* LUCK.

APPEAL from Farwell J. (1)

By a settlement made on April 24, 1867, in contemplation of the marriage of Frederick George Luck (hereinafter called "the testator") and Fanny Elizabeth Walker (hereinafter called "the testator's wife"), both British subjects domiciled in England, it was directed (inter alia) that after the death of the survivor the investments and personal property settled should be held in trust for such of the issue of the marriage as they should appoint. On November 12, 1888, they appointed that the settled property should be held in trust for all the children of their marriage, directing that the share of each child should be retained by the trustees who should pay the income thereof to the child during his or her life and after his or her death should divide the share equally between all the children of that child who should have been born within twenty-one years after the decease of the survivor of the testator and the testator's wife.

By his will dated December 20, 1883, the testator bequeathed his residuary estate to trustees directing them (inter alia) to hold it in trust for all his children living at his death who should attain the age of twenty-one years. The share of each child was to be held upon trust to pay the income to that child during his or her life, and immediately after the death of each child the trustees were to hold his or her share in trust for all the children of that child who should attain the age of twenty-one years, in equal shares.

The testator's wife died on June 14, 1892, and the testator died on July 1, 1896. There were nine children of the marriage, of whom one was Frederick Charles Luck (hereinafter called "the father") born in England on January 29, 1868.

On January 26, 1893, the father married Clare Henrietta Batiste, and there were two children of the marriage, the defendants Charles Pyne Luck and Eileen Marguerite Krjesinsky Astafiev. In 1905 he left them and went to the United States of America. From 1905 till 1918 one Martha Croft lived with him as his wife, and on July 26, 1906, she bore him a son at Whittier in California, David George Croft Luck (hereinafter

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(1) Ante, p. 323.

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called "the first defendant"). On March 5, 1920, the father swore a declaration of intention in California to become a citizen of the United States of America. On July 19, 1922, his marriage was dissolved by a final judgment of the Superior Court of the County of Los Angeles in California. On July 27, 1922, he married Alma Hyam. There was no issue of the marriage. On October 23, 1925, the father signed the following declaration: "This is to "certify that I, Frederick Charles Luck, do hereby publicly "acknowledge David George Croft Luck, the offspring of "Martha Croft, sometimes known as Martha Croft Luck, as "my own child and this declaration or acknowledgment is "made for the purpose of meeting all legal requirements to "establish his relationship as such and to effect his legitimation. I also declare that I have received him into my home "with the consent of my present wife, Alma Hyam Luck, "as my child, and have in all respects treated him as if he "were a legitimate child, and I hereby adopt him as such." There was evidence that the facts to which this declaration testified operated to legitimate the first defendant from birth under s. 230, of the California Civil Code. The father died on July 6, 1938.

The first defendant having claimed to be entitled as a child of the father to share in the trust funds subject to the trusts of the settlement and the will, the plaintiffs, the trustees, took out a summons on June 15, 1939, to determine whether he was so entitled.

On the question of fact whether the father had acquired a Californian domicil at the date of the birth of the first defendant both Farwell J. and the judges of the Court of Appeal held that there was not sufficient evidence to support the contention that he had done so. The part of the judgments relating to this question of fact are not reported.

Farwell J. held on the question of law (1.) that, although the father was not domiciled in California at the time of the birth, the child must be treated as legitimate by the English Courts; (2.) that it was not contrary to public policy to recognize legitimation in those circumstances; (3.) that the son was entitled to participate in the funds of the marriage settlement as well as those settled by the will, although he had not been legitimate at the expiry of twenty-one years from the death of the survivor of his grandparents.

The defendants, Charles Pyne Luck and Eileen Marguerite Astafiev, appealed. The appeal was heard on April 2, 3 and 4, and judgment given on June 21, 1940.

*A. F. M. Berkeley* for the appellants.

The question of legitimation is one of status. Under English law the question of status depends on the law of domicil.

[He referred to *In re Goodman's Trusts.* (1)]

It is not the domicil of the child but the domicil of the putative father on which the capacity to legitimate depends.

The English law does not recognize a capacity in any domiciled Englishman to cause his paternity to be recognized by reason of a change of domicil.

[He referred to *Udny* v. *Udny.* (2)]

The child must at his birth have, under the law of the country in which his father was then domiciled, the potentiality of being legitimized.

The Courts have decided the question of legitimation by subsequent marriage and they must be taken to have decided the question of legitimation by adoption in the same way. The question of legitimation by adoption is much stranger in these Courts than that of legitimation by subsequent marriage and it is submitted that the Court would not extend the law.

[He referred to *In re Wright's Will Trusts.* (3)]

In *In re Grove. Vaucher* v. *Solicitor to the Treasury* (4) all the judges thought the material question to be what the domicil of the father was at the date of the child's birth and that, unless under the law of that domicil the child could be legitimated, his legitimation under the law of another country was not to be regarded as legitimation in this country.

[SIR WILFRID GREENE M.R. It may be different when the legitimation is by statute and not dependent on something done by the father.]

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(1) (1881) 17 Ch. D. 266.
(2) (1869) L. R. 1 H. L. (Sc.) 441.
(3) (1856) 2 K. & J. 595, 601.
(4) (1888) 40 Ch. D. 216.

There is no difference in this respect between legitimation by subsequent marriage and legitimation by adoption. They both depend upon statute law but both involve an act by the father. If the father was domiciled in England at the date of the child's birth, no foreign land can confer on him a capacity to legitimize the child in the eyes of the English Courts. Here the father had not acquired a domicil of choice in California at the date of the child's birth and he still retained his domicil of origin.

Again, although for the purpose of the will in this case, it makes no difference whether or not the legitimation was restrospective, that is vital for the purpose of the settlement. The son cannot take a share under the settlement unless he was a legitimate child of the father when the father's share vested in his children in 1917, and he was clearly not legitimate then. Even though under Californian law legitimation dates back to the day of the child's birth, that could not operate to divest the members of the class as ascertained in 1917 of their vested interests. If this were not so, curious results would follow. Under the settlement the class to take is children of the father born within twenty-one years after death of the survivor of the settlor and his wife, that is, in 1917.

*J. Neville Gray K.C.* and *Belsham* for the respondent. It is not necessary to prove that the father had acquired the domicil under which he was entitled to legitimate his child as at the date of the birth of the child except in the case of legitimation by subsequent marriage. Here the legitimation results from the deliberate act of the father in publicly recognizing the child as his child. There is therefore no question of interfering with the rights of the father and imposing obligations on him by reason of an act that may not have been directed to legitimizing the child at all as in the case of legitimation by subsequent marriage: see per Fry L.J. in *In re Grove* (1), when he pointed out that the illegitimate child took the domicil of the mother and the status of illegitimacy but with it took also the capacity to become legitimate if, according to the law of the father's domicil, his subsequent marriage with the mother would legitimate the child.

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(1) 40 Ch. D. 216, 238.

[SIR WILFRID GREENE M.R. How does the present case differ from *In re Wright's Will Trusts* (1), where, according to French law, acknowledgment of the child as well as subsequent marriage was necessary ?]

Here the child is legitimated by adoption and is a very different kind of case from where legitimation depends on subsequent marriage, even if, as in French law, there has to be an acknowledgment of the child as well as the subsequent marriage. It may be that *In re Wright's Will Trusts* (1) was wrongly decided. There it seems to have been thought that legitimation arose from an implied contract to marry—an inchoate contract perfected by marriage. Legitimation by adoption clearly has nothing to do with contract.

[They referred to *Munro* v. *Munro* (2) and *Birtwhistle* v. *Vardill* (3) where under Scotch law the date of marriage is regarded as the critical date and also to *In re Goodman's Trusts* (4) and Dicey's Conflict of Laws, 5th ed., p. 558.]

All the authorities which attach importance to the father's domicil at the date of the child's birth relate to legitimation by subsequent marriage and there is no reason to extend it to a case of legitimation by adoption. While the child remains a minor he takes his domicil from his mother. It is quite plain that the law of California makes adoption the material date and that act of the father extends back to the date of the child's birth. That distinguishes it vitally from cases of legitimation by subsequent marriage when the legitimacy dates from the marriage in all systems of law. An illegitimate minor takes his domicil from his mother and the status of illegitimacy according to the domicil of the mother, but the child has the capacity for changing its status according to the domicil of the father : see *In re Grove.* (5) The father's domicil at the date of the child's birth is only material when legitimation is

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(1) 2 K. & J. 595.
(2) (1840) 7 Cl. & F. 842, 881.
(3) (1840) 7 Cl. & F. 895.
(4) 17 Ch. D. 266.
(5) 40 Ch. D. 216.

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effected by subsequent marriage. Here both the father and mother were domiciled in California and that fact gave the child a capacity of legitimation according to Californian law. The domicil of the mother at the time of the adoption of a child under twenty-one years of age is the vital matter. The material fact is the mother's domicil which the child takes while under age. If there be any need to show that the father is domiciled in California it can only be at the date of the adoption and not at the date of the child's birth and that he certainly was. The only case where the domicil of the father at the date of the birth of the child has been as material is when legitimation is effected by subsequent marriage. At any rate it has no application to a case where legitimation is the result of a deliberate act of the father. The propositions contended for are these: (1.) status depends on domicil; (2.) an illegitimate child has during infancy the domicil of its mother; (3.) the general rule therefore is that all questions of legitimation depend on the domicil of the mother except when legitimation will impose liabilities on the father against his will. In this exceptional case the legitimation will be recognized by the law of the father's domicil. The one general exception to these propositions is when legitimation depends on subsequent marriage and then the law of the domicil at the date of the child's birth is material.

[Luxmoore L.J. These propositions are contrary to the statements of the law in the text books.]

The authorities all deal with legitimation by subsequent marriage.

[They referred to *In re Askew.* (1)]

If contrary to the view so far advanced the vital domicil is that of the father, then it is his domicil at the act of adoption that is alone material, except as already pointed out, in the case of legitimation by subsequent marriage and that rested on implied contract: *In re Wright's Will Trusts* (2) and see also *Udny* v. *Udny* (3) and *In re Goodman's Trusts.* (4)

Lastly, the child is entitled to take under the settlement as well as the will. When the class to take under the settlement had to be ascertained in 1917, the child was then a member of the class although he could not prove it. That is because the Californian law legitimated him from birth, and the English Courts are bound to accept that.

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(1) [1930] 2 Ch. 259.
(2) 2 K. & J. 595.
(3) L. R. 1 H. L. (Sc.) 441.
(4) 17 Ch. D. 266.

*A. F. M. Berkeley* replied.

*Cur. adv. vult.*

1940. June 21. LUXMOORE L.J. The judgment I am about to read has been prepared by the Master of the Rolls as the judgment of the Master of the Rolls and myself. [His Lordship stated the facts and continued :] In these circumstances David Luck claims to be entitled to share equally with the other two defendants in the settled shares of Frederick Charles Luck in the funds settled by the marriage settlement and the will of the testator, alleging that although he was born illegitimate he was legitimated under the law of California and that this legitimation dates back to the moment of his birth. This claim was upheld by Farwell J. from whose decision the present appeal is brought by the two last named defendants the children of the first marriage of Frederick Charles Luck.

On behalf of the appellants two arguments are raised. First it is said that the English Courts will not recognize the purported legitimation in view of the fact that at the date of the birth of David Luck, Frederick Charles Luck was (as Farwell J. held) still domiciled in England. Secondly, it was said that in any event upon the true construction of the marriage settlement David Luck is not entitled to a share in the funds thereby settled in view of the fact that he was not legitimated before the expiration of the period of twenty-one years mentioned in the settlement.

Before dealing with the novel and interesting question of law raised by the first of these two arguments it is necessary to examine the question of fact as to the domicil of Frederick Charles Luck at the date of the birth of David Luck, namely, July 26, 1906. It is conceded by the appellants that if Frederick Charles Luck was at that date domiciled in the State of California the instrument of acknowledgment must be regarded in our Courts as effective to legitimate David Luck as from his birth. On behalf of the respondent the finding of Farwell J. on the question of domicil was attacked and we were invited to hold that Frederick Charles Luck had already acquired a domicil of choice in California when David Luck was born.

[His Lordship stated the facts bearing upon this question and came to the conclusion that Frederick Charles Luck had not acquired a domicil in California when David Luck was born.]

We now turn to a consideration of the effect of the instrument of adoption. So far as this is a matter for the law of California, Farwell J.'s finding of fact (which is not disputed) is as follows: "The effect . . . . was that the "first defendant became, according to that law the legitimate "son of his father as from the date of his birth." Farwell J. held that as David Luck was domiciled in California on October 23, 1925, the date of the act of adoption, his status was governed by the law of California and that accordingly an act which by that law had the effect of changing that status must be regarded in the Courts of this country as producing that effect for the purpose in hand. He held that the domicil of Frederick Charles Luck at the date of David Luck's birth and the fact that by the law of that domicil the status of David Luck was fixed at his birth as illegitimate were not relevant considerations, as they admittedly would have been if legitimation had been effected not by adoption but by a subsequent marriage of Frederick Charles Luck to Martha Anne Croft. He stated that he was unable to appreciate the reasons why, in the case of legitimation per subsequens matrimonium, the existence at the date of birth of a potentiality of such legitimation according to the law of the country in which the father is domiciled at the time has been held to be necessary: and he declined to regard the authorities in which the law was so laid down as binding him to apply a similar principle to the facts of the present case.

Two preliminary observations may be made with regard to this decision of the learned judge. In the first place he assumes that the domicil of David Luck on October 23, 1925, was Californian. As David was illegitimate his domicil followed that of his mother, Martha Anne Croft. The evidence was not directed to the question of her domicil which was not necessarily the same as that of Frederick Charles Luck. We do not even know what was her domicil of origin, nor, apart from the facts of her association with Frederick Charles Luck, have we any material upon which to base an inference as to her intentions. However, for present purposes we will assume that Martha Anne Croft and, consequently, David Luck were on October 23, 1925, domiciled in California.

The other observation is this. Even if the view of the learned judge is right, that the only matter to be considered is the domicil of David Luck at the date of the adoption, it does not appear to us necessarily to follow that the Courts of this country will give effect to the law of California in so far as it relates back to David Luck's birth. Let it be assumed (for the sake of argument) that during such time as a person is domiciled in a given country a change in his status effected by the law of that country will be regarded as effective in the English Courts. Let it also be assumed (as we conceive the law to be) that no provision of the law of a foreign country will be regarded in the English Courts as effective to change the status of a person not domiciled in that country at the time—except, perhaps, in the case where the law of the country in which such person is domiciled would itself recognize the effectiveness of the foreign law in question. In the present case the law of California has been held by Farwell J. to have had the effect of imposing a particular status upon David Luck during a period when that law was not competent to affect his status in any way. From the date of his birth down to the time, not ascertained, when Martha Anne Croft acquired a Californian domicil, the status of David Luck was in the view of Farwell J. governed entirely by the law of the domicil of Martha Anne Croft which we assume to have been English. By that law

David Luck was on any view throughout that period illegitimate. Will the English Courts recognize the power of Californian law retrospectively to affect the status of a person in respect of a period when that status was subject to the law of England and none other? Having regard to the view which we take on the broader issue and to the fact that this particular point was not argued before us, we do not think it necessary or desirable to express a concluded opinion upon it. Its practical importance would have lain in the fact that, if the competence of the law of California was confined to the period when David Luck was in fact domiciled in California, it would have been necessary to enquire whether or not he had acquired a Californian domicil before the expiration of the period of twenty-one years mentioned in the marriage settlement, namely, July 1, 1917.

Apart from the principles of private international law which form part of the law of England, that law did not recognize legitimation of a child born illegitimate until the passing of the Legitimacy Act, 1926. In this respect the law of England differed from the civil and the canon law and from the law of Scotland and that of many continental countries all of which recognized one particular form—and so far as we know one form only—of legitimation, namely, legitimation by subsequent marriage of the parents. Under the law of France (and possibly in other countries) it appears that in addition to the marriage of the parents a formal recognition of the child by both of them was required: see *In re Wright's Will Trusts.* (1) But in the eye of English law in the narrower sense legitimation was impossible, except of course, by Act of Parliament. A child born illegitimate remained illegitimate until its death with all the consequences which that status implied. These consequences affected not merely the child itself, but its mother and its natural father whose rights and duties towards the child were governed accordingly. This rigid rule of English municipal law has been qualified to meet the case of legitimation by subsequent marriage of the parents in cases where the law of the father's domicil at the time of the birth of the child and the law of the father's domicil at the time of the subsequent marriage recognized such legitimation. In these cases the English Courts recognize the legitimation as effective: but where the law of the father's domicil at either of the two times stated did not recognize such legitimation the marriage was regarded as inoperative to effect legitimation notwithstanding that the law of the father's domicil at the other of the two times recognized legitimation by subsequent marriage: see *In re Wright's Will Trusts* (1); *Udny* v. *Udny* (2); *In re Grove.* (3) The special case of heirship to land in England need not be considered.

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(1) 2 K. & J. 595, 613.

An alteration of the law has been effected by s. 8 of the Legitimacy Act, 1926, which enables legitimation to take place where the law of the father's domicil (not being English) at the date of the marriage recognizes the marriage as effective to legitimate the child. In such cases legitimation takes place as from the date of the commencement of the Act or the date of the marriage, notwithstanding that the law of the country where the father was domiciled at the date of the birth did not recognize legitimation by subsequent marriage. It is to be noticed that legitimation under the section is not retrospective and in none of the cases which were decided before the Act did any question of restrospective legitimation arise.

It so happens that the only form of legitimation which has hitherto come up for consideration by the English Courts has been legitimation per subsequens matrimonium. This was the method of legitimation commonly found in systems of law other than our own and it was in relation to this method that the rules adopted by the English Courts came to be formulated.

So far as we are aware this is the first case which has arisen in the English Courts where a different method of legitimation, namely, by adoption, has had to be considered. The next point which arises is whether the requirements with regard to the domicil of the father which exist in the case of legitimation per subsequens matrimonium must be complied with in such a case, or whether, as Farwell J. held, the matter falls to be decided by reference only to the law of the country in which the child was domiciled at the date when the legitimation is said to have taken place.

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(1) 2 K. & J. 595, 613.
(2) L. R. 1 H. L. (Sc.) 441.
(3) 40 Ch. D. 216.

It is useful at the outset to consider certain consequences which flow from the view adopted by Farwell J. The law of California provides for legitimation per subsequens matrimonium as well as for legitimation by adoption by the natural father. Accordingly, if Frederick Charles Luck had on July 27, 1922, married Martha Anne Croft instead of Alma Hyam and had not in addition adopted David Luck, the English Courts would not (apart from the operation of s. 8 of the Legitimacy Act, 1926) have regarded David Luck as legitimate, since Frederick Charles Luck was domiciled in England at the date of the birth. If, however, in addition to marrying Martha Anne Croft, Frederick Charles Luck had adopted David Luck with her consent, the English Courts would have recognized the legitimation. This result would, to say the least of it, be anomalous. A result even more anomalous would follow in a case where a man had two illegitimate children by two different women. If he subsequently married one of them but did not trouble to adopt her child and then adopted with her consent the child of the other woman, the former child would (apart always from the Legitimacy Act, 1926) be regarded in this country as illegitimate, the latter as legitimated. These considerations in our view afford some reason for adopting, upon grounds of convenience, a uniform principle applicable to both cases. But this by itself is not sufficient and it becomes necessary to examine the authorities in which the rules applicable to cases of legitimation per subsequens matrimonium have been laid down.

The earlier reported cases relate to the law of Scotland. The case which settled the Scotch law as to legitimation was that of *Munro* v. *Munro* (1) decided by the House of Lords. Before that decision it had not been finally decided that the

(1) 7 Cl. & F. 842.

domicil of the putative father affected the status of the child: per Lord St. Leonards in *Shedden* v. *Patrick*. (1) In *Munro* v. *Munro* (2) it was decided in the words of Lord Cottenham L.C. that " The child of a Scotchman, though born in England, "would become legitimate for all civil purposes in Scotland, "by a subsequent marriage of the parents in England, if "the domicil of the father was and continued throughout to "be Scotch," that is to say, if his domicil was Scotch both at the time of the birth and at the time of the marriage. Scotch law, he said (3): " Does not admit the indelibility "of bastardy," thus differing from English law.

Apart from the case of *Birtwhistle* v. *Vardill* (4), decided in 1840, which dealt with the special matter of heirship to land in England, the earliest English case appears to be *In re Wright's Will Trusts* (5), decided by Lord Hatherley, then Sir William Page Wood V.-C. In that case a domiciled Englishman was the putative father of an illegitimate child and afterwards became domiciled in France where he married the mother of the child. The effect of the decision upon the point now relevant is stated in the headnote as follows: " The law of "the domicil of the putative father attached to the child at its "birth, and by that law its bastardy was indelible." This, in our opinion, concisely states the effect of the decision. Some passages from the judgment will make this clear. Lord Hatherley says (6), after referring to *Birtwhistle* v. *Vardill* (4): "According to the English law, a child not born in wedlock "is filius nullius; and it is impossible for an Englishman, "as long as he remains subject to the laws of England, to "render such a child legitimate. The offspring of any woman "not married cannot be attributed to any particular father in "England except for certain criminal purposes in bastardy. "There is no connection between the father and the child, "and nothing done by the father afterwards can improve "the condition of the child." Later he says (7): " A domiciled "Englishman having a child before marriage in any part of

(1) (1854) 1 Macq. 535, 634.
(2) 7 Cl. & F. 842, 874.
(3) Ibid. 873.
(4) 7 Cl. & F. 895.
(5) 2 K. & J. 595.
(6) Ibid. 607.
(7) Ibid. 610.

"the world by a woman of any other nation, the legitimacy "or illegitimacy of that child must be determined by the law "of his domicil," that is to say, the domicil of the putative father. Also he says (1): "On every point of principle, the "law of the father's domicil having fastened on the child, I "am driven to this dilemma: if the child be legitimate, it is "the child of one who, at its birth, was a domiciled English-"man: but if that is admitted, and it is conceded that the "child was born before marriage, it must be illegitimate, for "it has no father by the English law, and nothing can afterwards "establish any relationship between the putative father and "the child." He relies (2) on the decision in *Munro* v. *Munro* (3), notwithstanding that that was a Scotch case. He points out the serious results which would follow in the matter of rights to property under (for example) wills if a domiciled Englishman, being the putative father of an illegitimate child, could afterwards legitimate such child. "Why," he asks, "is a testator in England to assume that the parent of "his legatees may introduce illegitimate children to share "with them, which he could not do by the law of this "country?" He concludes his judgment by saying, "I "think, as Lord Cottenham says in *Munro* v. *Munro* (3), the "question in such cases must be, can the legitimization of the "children be effected in the country in which the father is "domiciled at their birth, for their legitimacy must be decided "by the law of that country once for all?" This is not an exact quotation of Lord Cottenham's language but represents Lord Hatherley's view as to its effect.

The next case is *Udny* v. *Udny*. (4) That was the case of a domiciled Scotchman: but Lord Hatherley made some observations on the law of England which are important. He sees no reason (5) to retract the opinion which he had expressed in *In re Wright's Will Trusts* (6), and proceeds as follows: "The status of the child—with respect to its "capacity to be legitimated by the subsequent marriage of its

(1) 2 K. & J. 595, 612.
(2) Ibid. 613.
(3) 7 Cl. & F. 842.
(4) L. R. 1 H. L. (Sc.) 441.
(5) Ibid. 447.
(6) 2 K. & J. 595.

"parents—depends wholly on the status of the putative "father, not on that of the mother. If the putative father "have an English domicil the English law does not, at the birth "of the child, take notice of the putative father's existence. "But if his domicil be Scottish, or of any other country "allowing legitimation, though the mother be English at the "birth, the putative father (as in *Munro* v. *Munro* (1) ) is "capable of legitimating the child. The foreign law, though "deeming the child to be filius nullius at birth, yet recognizes "the father as such at the moment of his acknowledging the "child, either by marriage and formal recognition, as in "France, or by marriage only, as in Scotland. I do not think "that the English law can recognize a capacity in any "Englishman, by a change of domicil, to cause his paternity "and consequent power of legitimation to be recognized. "But however this may be, the question does not, in my "judgment, here arise."

The next case to which reference must be made is *In re Goodman's Trusts* (2) a decision of this Court. It was there held that an illegitimate child born to a man domiciled in Holland who subsequently married the mother while still domiciled in Holland and thereupon became legitimate according to the law of Holland could take under the Statute of Distributions. Cotton L.J. says (3): "It was urged in "support of the decision of the Master of the Rolls that the "law of England recognizes as legitimate those children "only who are born in wedlock. This is correct as regards "the children of persons who at the time of the children's "birth are domiciled in England. But the question as to "legitimacy is one of status, and in my opinion by the law "of England questions of status depend on the law of the "domicil." He speaks here and elsewhere in his judgment of the domicil of the "parents." It would appear that in that case the mother of the child had acquired a domicil in Holland at the date of the birth of the child so that the domicil of both parents was Dutch at the relevant times. We

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(1) 7 Cl. & F. 842.

(2) 17 Ch. D. 266.

(3) Ibid. 291.

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cannot interpret the reference by Cotton L.J. to the domicil of "the parents" as meaning that both parents must be domiciled in a country whose laws recognize legitimation. This would be contrary to what has been said in all other cases and would be laying down much too rigid a standard. When the Lord Justice refers to domicil his words must, we think, be construed as referring to the domicil of the putative father. This accords with the view of Stirling J.: see *In re Grove.* (1) Upon this interpretation the passage which we have quoted is in agreement with the view of Lord Hatherley whose decision in *In re Wright's Will Trusts* (2) Cotton L.J. regards as consistent with his own. (3) James L.J. says (4) that the status of a person, his legitimacy or illegitimacy, is to be determined by "the law of the country of his origin—the law "under which he was born." The rest of his judgment appears to us to show that it is the domicil of the father which he regards as the relevant consideration for this purpose since he nowhere refers to the mother.

*In re Grove* (5) was a case decided in this Court. The putative father (as the majority of the Court found) was domiciled in England at the date of the birth of the illegitimate child and at the date of his subsequent marriage to the mother, his domicil of origin being Geneva and the mother being a domiciled Englishwoman. All the members of the Court took the view that legitimation per subsequens matrimonium is only recognized by the English Courts where the domicil of the putative father at the time both of the birth and of the marriage is in a country the laws of which recognize such legitimation. Cotton L.J. says (6): "What is really necessary, "I think, is that the father should at the time of the birth of "the child be domiciled in a country allowing legitimation, so "as to give to the child the capacity of being made legitimate "by a subsequent marriage. But it is the subsequent marriage "which gives the legitimacy to a child who has at its birth "in consequence of its father's domicil the capacity of being

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(1) 40 Ch. D. 216, 222.
(2) 2 K. & J. 595.
(3) 17 Ch. D. 295.
(4) 17 Ch. D. 297.
(5) 40 Ch. D. 216.
(6) Ibid. 232.

"made legitimate by a subsequent marriage," and again he says (1): "In my opinion, the domicil at birth must give "a capacity to the child of being made legitimate, but then "the domicil at the time of the marriage, which gives the "status, must be domicil in a country which attributes to "marriage that effect." Fry L.J. says (2) that he agrees with the law as laid down by Cotton L.J.: but he says that "at "birth that child took the domicil of its mother and it took "the status of illegitimacy, according to the law of the domicil "of its mother." He goes on to say that "it took also the "capacity to change that status of illegitimacy for one of "legitimacy, provided that according to the law of the domicil "of the father the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, "taking domicil and status from the mother, but taking the "potentiality of changing its status from the putative father." In the first of these two passages Fry L.J. does not say that the question whether a child is illegitimate is to be determined by reference to the domicil of the mother—that clearly could not be so. What, in our opinion, he means is that once it is established that a child is illegitimate, the particular legal consequences which flow from that status are to be ascertained by reference to the domicil of the mother: but this is qualified by what he says in the second passage quoted, viz., that one element in the status of the illegitimate child is to be determined by reference to the law of the domicil of the father, namely, the potentiality of subsequent legitimation. Lopes L.J. agreed with Cotton L.J.

In our judgment the principles laid down in the authorities which we have cited are not limited to the one case of legitimation per subsequens matrimonium. It is natural that references to that form of legitimation should have found a place in the statements of the law since that was the particular form that was relevant in those cases. But the language used is, we think, of wider import. In particular, Lord Hatherley in the passages from *In re Wright's Will Trusts* (3) which we have cited lays down the principle in quite general terms which clearly cover the present case. He regards the law of the father's domicil as "fastening on" the child at its birth and as determining the nature of their relationship. If by the law of that domicil the relationship is immutably that of putative father and illegitimate child, nothing thereafter can change it. If, on the other hand, by the law of that domicil such relationship is not immutable but is capable of becoming that of father and legitimate child, that capacity when duly fulfilled is to be recognized by the Courts of this country.

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(1) 40 Ch. D. 216, 233.
(2) Ibid. 238.
(3) 2 K. & J. 595.

There appear to us to be sound reasons in principle why this should be the law. Legitimacy is not a unilateral matter affecting the child alone. If an illegitimate child is legitimated it is not only the status of the child which is affected: the status of the putative father is also changed since he becomes what he was not before, namely, the father of a legitimate child with all the consequential rights and duties which flow from that relationship. Moreover, the position of the child is changed as regards the father's relatives: for it acquires the capacity to succeed to their property as next of kin, while they similarly acquire a like right to succeed to his property. If the question of the effect of the adoption of David Luck upon his legitimacy is to be determined by the law of his domicil at the time, it would apparently follow that if he had been legitimated by a privilegium enacted by the legislature of California he would have been regarded as legitimate by the English Courts, even if his father had been domiciled in England at the time. In other words, the English Courts would recognize the jurisdiction of a foreign legislature to impose upon a domiciled Englishman the status of paternity which he did not acquire at the date of the child's birth and the potentiality of acquiring which he did not at the time possess. We cannot accept a view which would lead to that result.

When the question of legitimation per subsequens matrimonium first came up for examination in *In re Wright's Will Trusts* (1), the law might have been laid down differently and it might have been held that the domicil of the father or of the child at the date of the marriage was the sole matter to be considered. Lord Hatherley's decision in that case was, we think, largely influenced by the Scotch law as laid down by the House of Lords in *Munro* v. *Munro*. (1) It was natural that the English law on this matter should be founded upon the same principles as Scotch law which required the potentiality of legitimation to exist at the date of the birth. The result is that the English authorities have been based upon the principle that before subsequent legitimation can take place the status of illegitimacy as acquired at birth under the law of the domicil of the putative father must have as an integral part of itself the potentiality of subsequent legitimation. If it has not this potentiality, it is incapable of change since the capacity to be changed exists and exists only by virtue of the potentiality. It is in our opinion only within these narrow limits that the English law recognizes an exception to the principle that bastardy is indelible, a principle which it always steadfastly maintained in opposition to the civil and the canon law save in so far as it was forced to recognize an exception in cases of persons not domiciled in England.

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(1) 2 K. & J. 595.

It was suggested that a logical distinction between the present case and the case of legitimation per subsequens matrimonium might be found in the circumstance that the act of adoption by the father was done deliberately for the purpose of legitimizing the child, whereas marriage is contracted for its own sake and the consequential legitimation is, so to speak, only a collateral result. There appears to us to be no substance in this distinction. Moreover, as we have already pointed out, it appears from *In re Wright's Will Trusts* (2), that by French law an act of recognition was required in addition to the marriage and it was not suggested that this circumstance in any way affected the principles to be applied.

We may conclude this part of our judgment by a reference to the views of the late Professor Dicey. In the 3rd ed. of his Conflict of Laws—the last in which his name appears as an

(1) 7 Cl. & F. 842.

(2) 2 K. & J. 595.

editor—the following passage appears (at p. 532): "What "is the effect, according to English law, of a person being made "legitimate by the authority of a foreign sovereign? "Suppose that a person born illegitimate is legitimated by a "decree of the King of Italy, or under an Act of an American "State, will such a person be held legitimate here? There "is no English authority on the subject. The most probable "answer is (it is conceived) that the effect of such a decree "would, like the effect of a subsequent marriage of the parents, "depend on the domicil of such person's father at the time of his "birth and at the time when the decree was issued. Suppose, "that is to say, that the child's father were domiciled in Italy "at the time of the child's birth and at the date of the decree, "then the decree would have the effect of making the child "legitimate in England. If, on the other hand, the father "were domiciled in England, either at the time of the birth "or at the date of the decree, the child would apparently not "be legitimated in England thereby." The view which he favours is the same as our own. In the 5th edition of the same work the learned editor, Professor Berriedale Keith, has altered this passage. The question which he formulates (at p. 570) is: "Suppose that a person born illegitimate is "legitimated by a decree of the Government of Italy, or under "an Act of an American State, through declaration made by "a parent or otherwise, will such a person be held legitimate "here?" He says that "very possibly the answer is simply "negative" and he then goes on to describe Professor Dicey's answer as a "possible" one, adding that "in view of the "adoption by the Legitimacy Act, 1926, s. 1, of the time of "marriage as the decisive moment, it may be that the time "of recognition would alone be deemed of importance and the "domicil of the father at the time be deemed decisive." We prefer the view of Professor Dicey and we cannot see that the terms of the Legitimacy Act can affect the matter.

The alternative argument advanced by the appellants only affects the share of Frederick Charles Luck under the marriage settlement of his parents. It is said that even if the legitimation of David Luck is held to be valid and to operate retrospectively to the date of his birth he cannot take under the settlement because the legitimation did not in fact take place until after the expiration of the period of twenty-one years from the death of the settlor within which issue must be born in order to take a share. Farwell J. rejected this argument. But as our decision upon the question of legitimation makes a decision upon the point unnecessary, we express no opinion upon it.

In the result the appeal is allowed. The order of Farwell J. will be varied by substituting for the declaration which he made a declaration as asked for by the notice of appeal to the effect that David Luck is not entitled to any share in the shares (original or accruing) of Frederick Charles Luck under the marriage settlement and the will.

SCOTT L.J. Before writing this judgment, I had the advantage of reading the majority judgment. I accept its narrative of the facts, subject to certain qualifications in regard to inferences from the evidence bearing upon the domicil of David Luck and of his father and mother in the earlier years of his life. I recognize the force of much of its reasoning: but I cannot agree with its conclusions. In my humble opinion, it fails to give due effect to the law of personal status in Private International Law as applied in English Courts: it predicates of the decisions on which it relies a relevance which they do not possess; and it attributes to opinions expressed in those cases a generality of application which, if intended, was not justified by the peculiar considerations affecting the law of legitimation by subsequent marriage with which they were concerned. In any case, for the purposes of this appeal, I regard those opinions as obiter, and as not binding this Court in the present case, upon which I know of no direct authority.

In regard to the facts, I am at one with my colleagues in rejecting the submission made by Mr. Neville Gray for David Luck, that the latter's father was, at the date of his birth, already domiciled in California. The evidence to that effect was not enough to shift the burden of proof. On the other hand, I think that the evidence does suffice to establish his

Californian domicil not very long afterwards. He was then already living with the mother at a house in Whittier, California, and calling her publicly "Mrs. Luck." He bought this house in 1907; and, except for absence which proved temporary, they lived there till 1911, when they moved to a place called Chicago Park, also in California; where he purchased a house and fruit ranch. They lived there till 1916, when they moved to Oakland, California, for the sake of the boy's schooling; and lived there together till 1918. They then separated, probably because he had fallen in love with the Californian lady whom he married in 1922, after the Californian Court had dissolved his marriage with his first wife.

On the above facts, but for the doubts thrown upon his intentions in the early years by the evidence to which my colleagues refer, I should have inferred that he had made California his "permanent home" not later than 1907: but I think that those doubts are disposed of by his abandonment of his Arizona schemes in 1910, confirmed by his subsequent purchase of the fruit ranch in 1911. The evidence also in my view justifies an inference of fact, that the mother, too, made California her "permanent home" either contemporaneously with, or immediately after the father's change. Several considerations point that way. She had from before David's birth called herself his wife, and wholly identified her life and her home with his: she had faced the difficulties of an unmarried mother once, and no doubt shrank from either taking, or refraining from any step which might jeopardize the union with him of life and home, and bring her face to face with those difficulties again: she evidently was fond of him, and was under his influence: her affidavit also shows that financial reasons must have influenced her mind in the same direction. I therefore conclude that for all those reasons combined, she adopted a Californian domicil when he did, or very soon after. It is worth noticing that there is no positive evidence whatever the other way, as there was in *In re Annesley* (1) where Russell J. (as he then was) discussed the law of domicil, and in spite of strong contrary evidence, held that a change of domicil was

(1) [1926] Ch. 692, 701–2.

proved. As soon as she changed her domicil, David by operation of law followed suit. I have dealt with this issue of fact as to the dependent domicil of David, lest if the case go further, it should be held (contrary to what I venture to think myself), that a Californian domicil at some earlier date than that of legitimation is essential for the father, or, at or before that date, for David.

The first task of the Court below was to ascertain, with such expert evidence as was given, the meaning of the Californian statute; and on that evidence the learned judge was left, as we are left, to construe its language. I think my brethren concede that by Californian law David Luck was, in California, made completely legitimate, that is, from birth: but they hold that it is contrary to English law to recognize the resulting status of legitimacy as in any way touching his illegitimacy prior to the moment of legitimation; basing their view on the ground that the father had not his Californian domicil at the moment of the son's birth. The phrase "English law" means "the whole of English law," including the principles of Private International law as administered in English Courts: see *In re Askew* (1) and the cases there discussed by Maugham J. (as he then was); and in this judgment I use the phrase in that sense, unless the context indicates otherwise. Conversely "the whole of "Californian law" may include principles of English law, in so far as they are proved to be incorporated in Californian law. Hence the theoretical possibility of some doctrine of renvoi in Californian law.

It may be convenient that I should at once state my own reasoning, leaving till later the main support for it, from decided cases and the opinions of jurists. The father was, on October 23, 1925, by reason of his status of a domiciled Californian, duly qualified by Californian law to avail himself of s. 230 of the Code. He did so. Californian law thereupon clothed David in California with the status of a legitimate son of his father. I construe the statute as conferring legitimacy from birth. If I am right in thinking that David's mother had already acquired a Californian domicil, David had by operation of law, through her because of his illegitimacy, already acquired a Californian domicil, and, therefore, then possessed the status of an infant domiciled Californian. Alternatively, if I am wrong in that inference of fact, and if therefore David at the moment of legitimation still had his domicil of origin, the same consequence would result in another way. Upon the acquisition of his status of legitimacy he would, by operation of law, enter into the dependent relationship to his father of a legitimate infant son; and that relationship would automatically import for him the same domicil as his father. Therefore, upon legitimation, quacunque via, David had the status of a legitimate son and a Californian domicil. When the question arose of his right to enforce in England his claim as the legitimate son of his father to share in the personalty covered by his grandfather's settlement and will, the facts and legal principles material to his cause of action were in my opinion these: (1.) His status in California was that of a legitimate son of his father with a domicil in California; (2.) that status, established by the law of that "foreign country," was under English law one which it was the duty of an English Court to recognize, and prima facie to enforce in accordance with its nature and attributes as determined by the law of that country, proved in the usual way. (I use the words "foreign country" in Dicey's sense: see his Conflict of Laws, "Definitions"); (3.) there was no evidence of "renvoi" in Californian law; (4.) an English Court cannot reject, qualify, or make an exception from the context of the foreign status, unless there is some definite and positive rule of English law, written or unwritten, forbidding the application of the foreign status or commanding some specific qualification or exception. My colleagues think that there is such a rule, and find it in the decisions about legitimation by subsequent marriage, which postulate the possession by the natural father of the same domicil at the date of the birth as at the date of the marriage. I recognize that, in a case of subsequent marriage, I should be bound by *In re Grove* (1), although I have great difficulty in grasping the legal justification of that rule, even in such case; but neither Farwell J. nor I think it relevant to the present case. Out of respect, however, for the judgment of my colleagues, I must state fully my reasons for dissenting—the more so as Farwell J. did not find it necessary to explain why he thought those cases irrelevant to the present.

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(1) [1930] 2 Ch. 259.

In that branch of English municipal law which is indifferently known as "private international law" or "conflict of laws," there are three legal conceptions relevant to this appeal: Domicil, Status and Legitimacy. Domicil is, normally, the factor which brings into operation the law which creates status; legitimacy is just a particular kind of status. Status is in the main a matter of personal capacity; Story so described it in Chapter IV. of his Conflict of Laws; and it is helpful to keep that aspect of it in mind. In regard to domicil, there is no divergence of principle between my colleagues and myself as to its nature, or how a change of domicil happens or is proved: but, whereas in countries, whose system of law is based on the Civil Law, or the Code Napoléon, nationality has become the foundation of status, in England and all countries whose system derives from our common law, domicil is its normal foundation; but the normal rule of English municipal law, that status depends on domicil, may perhaps not cover every origin of status. This difference of view as to the foundation of status does not prevent substantial identity of English and Continental views about status when created. When a certain status accrues to a person, it is the same personal status, whether it rests on the foundation of domicil or on the foundation of nationality; cf. per Lord Phillimore in *Salvesen* v. *Administrator of Austrian Property*. (2) Legitimacy is status in one set of human relations—that of the family; but it is the general principles of the English law of status which I think throw most light on the nature and scope of the particular status of legitimacy. From one point of view legitimacy is the positive status, of which illegitimacy is the negative; but that verbal contrast is not very helpful to an understanding of the

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(1) 40 Ch. D. 216.

(2) [1927] A. C. 641, 670.

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true extent of the change in status from illegitimacy to legitimacy brought about by the act of law, called legitimation. When the status of legitimacy is given to an illegitimate person, it is so given by the law of the country which creates his general status, although, except where a sovereign legislature passes a statute making a named person legitimate, as a privilegium or rescriptum principis, it is always upon the action of some person—usually the natural father—that the law is put into motion. Whether the father can do that depends on his status in the country whose law is to be put in motion. As long as the father of David had an English domicil, his status under English law conferred on him no power to legitimize David. When he acquired a Californian domicil his status, and therefore his personal capacity, did change because the local law created in him a status which carried that power, and defined the conditions for its exercise. When he had exercised it, the law ipso facto conferred on David the status in California of a legitimate infant son.

Of the three conceptions, status is the most far-reaching; and in my opinion its general principle provides the key to the solution of the present problem. It constitutes, as it were, a legal genus. It contains many species, all of daily importance in civilized life. In the table of contents of his book on Domicil (1870), Dicey enumerated seven particular kinds of status: parent and child, guardian and ward, infancy, legitimacy, husband and wife, lunatic and curator or committee, corporations—and there are others. Testamentary and intestate succession to personalty, for instance, depends primarily on the legal attributes attaching to the status of the deceased, although his status was acquired through domicil. Domicil in the country concerned is important, because it is the factor which English municipal law treats as the prime factor in bringing into operation the local law which creates the status and gives it its legal content: and, generally speaking, there is no difference in this respect as between one species of status and another. Status is in every case the creature of substantive law: it is not created by contract, although it may arise out of contract, as in the case of marriage, where the contract serves as the occasion for the law of the country of the husband's domicil to fix the married status of the parties to the contract. Perhaps the most far-reaching characteristic of status, and the most material to the decision of the present case, is its quality of universality, both in the general jurisprudence of other nations and in private international law as applied by English Courts. The general principle of status is that, when created by the law of one country, it is or ought to be judicially recognized as being the case everywhere, all the world over. By "everywhere," I mean at least in every "country" where the rule of law prevails; and again I use the word "country" in Dicey's sense. Status affects not only the relations of the person to the public, but the relations of the public to him. All are interested. And that is one reason why, when a competent court in any country adjudicates upon the particular status of some person, it recognizes the presence or absence of that status, and its judgment has effect as a judgment in rem. I have ventured the phrase "is or ought to be," because English law has, since the end of the 18th century, been tending more and more to accept, and in my opinion now does accept, the general principle that status acquired in one "country" ought, prima facie, and subject to certain exceptions due to local rules of positive law, to extend and be applied everywhere. Authority for much of what I have just said is contained in the opinions of the House of Lords in *Salvesen* v. *Administrator of Austrian Property* (1), in which the status in question happened to be that of married persons; see per Lord Haldane on the respective natures of domicil and status, and the effect of a judgment on status being that of a judgment in rem (2): "The status of married persons as dependent on divorce is "a matter for which the Court of their domicil is the appropriate "Court, and its decision is treated by our Courts as not only "being valid but as conclusive. . . . . If this was a judgment "determining the status of the supposed husband and wife it "may well be that it should be regarded as having been binding "on third parties as having been a judgment in rem. For what

(1) [1927] A. C. 641.

(2) Ibid. 652–3.

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"does status mean in this connection ? Something more than "a mere contractual relation between the parties to the "contract of marriage. Status may result from such a "contractual relationship, but only when the contract has "passed into something which private international law "recognizes as having been superadded to it by the authority of "the State, something which the jurisprudence of that State "under its law imposes when within its boundaries the ceremony "has taken place. This juridical result is more than any mere "outcome of the agreement inter se to marry of the parties. It "is due to a result which concerns the public generally, and "which the State where the ceremony took place superadds ; "something which may or may not be capable of being got rid "of subsequently by proceedings before a competent public "authority, but which meantime carries with it rights and "obligations as regards the general community until "so got rid of. There is nothing unusual in this doctrine. . . . "When, therefore, it is necessary to determine what married "status implies and how far rights or acts are affected by it, "it is necessary to determine the law by which they are fixed." Lord Dunedin expressed general concurrence as to the meaning of status and its legal aspect of a "res" (1), and again in his fifth proposition (2) Lord Phillimore said this (3) : "As to the "general principles of international law upon this subject as "viewed by British Courts it seems to me pretty clear that "for the purpose of pronouncing upon the status of parties "as well as for the purpose of affecting that status the Court "of the law which regulates or determines the personal status "of the parties, if they are both subject to the same law, "decides conclusively. I have used the expression 'the law "'which determines the personal status' because there are "countries which would refer to nationality rather than to "domicil ; but the principle is the same. The text first quoted "in *Shaw* v. *Gould* (4) and then cited in *Le Mesurier* v. *Le* "*Mesurier* (5), and in *Lord Advocate* v. *Jeffrey* (6), was not,

(1) [1927] A. C. 641, 662.
(2) Ibid. 663.
(3) Ibid. 670–1.
(4) (1868) L. R. 3 H. L. 55, 83.
(5) [1895] A. C. 517, 538.
(6) [1921] 1 A. C. 146, 152.

"I apprehend, intended to be confined to decrees which effect "something, but deals also, if not primarily, with decrees "which decide upon the existing status. 'Quum de statu "'et conditione hominum quaeritur uni solummodo judici et "'quidem domicilii universum in illo jus est attributum.'" He was there in effect commenting on the quotation from Erle C.J. in *Hobbs* v. *Henning* (1), which Macmillan K.C. (as he then was), had cited in his argument.

Before the 19th century status had gained only incomplete recognition as a separate juridical conception; and its genesis, nature and attributes had not been fully explored. Indeed Story, writing in 1834, in s. 10 of the first edition of his Conflict of Laws, said of the whole subject of private international law: "The subject has never been systematically "treated by writers on the common law of England; and, "indeed, seems to be of very modern growth in that kingdom; "and can hardly, as yet, be deemed to be there cultivated." One notices in certain judgments of the first half of the 19th century some confusion between domicil as the cause, and status as the effect of the foreign law operating; between domicil and nationality; and occasionally, for example, in marriage cases, between contract and status. The historic parting of the ways between English law which saw in domicil the main deciding factor in the creation of status, and continental law, which especially after the Code Napoléon relied on nationality, almost escaped notice in England till after the middle of the century. There is a footnote by Sir Frederick Pollock in the report of *In re Askew* (2), which is in point: "The substitution of nationality for domicil by modern "Continental doctrine and legislation as the criterion of personal "law was at that time" (he was referring to 1869) "a novelty." The attribute "personal" in the phrase "personal capacity," refers no doubt primarily to the natural person; but a juridical person also has a status, for example, a corporation at common law, or by statute; a limited liability company. In some legal systems the persona juridica includes unincorporated groupings of persons such as English law has never personified.

(1) (1865) 34 L. J. (C. P.) 117, 123.

(2) [1930] 2 Ch. 259, 265.

The complications of such "persons" are foreign to the issues of this appeal; but the combined requirements of comity and practical convenience which are so obvious in the case of the artificial person, that the same status should attach everywhere, are in truth essential also to the status of the natural person; and show the underlying reason for the doctrine of its universality.

These elementary reflections lead, as I think inevitably, to the conclusion that universality is the basic principle of status in private international law—both in general and in the intendment of English law; that the particular status brought into existence by the law of country A must have attributed to it by country B the self-same personal capacity or incapacity, and the self-same rights and duties, which country A conferred or imposed upon that person, natural or artificial; and that the courts of country B can introduce into that status no exceptions or qualifications unknown to the law of its creation, unless they are bound to do so by some definite and positive rule of municipal law, whether statutory or common law, which prohibits them (as in *Birtwhistle* v. *Vardill* (1)) from giving effect to the country A status, or commands them to introduce some specific condition or other modification, when asked to apply the consequences which by the law of country A would flow from that status in the particular circumstances of the case before them.

The preceding considerations about status reduce within a narrow compass the questions which, in the present case, remain open in regard to domicil. To the exercise of the father's facultative right in California, conferred on him by reason of his domicil under Californian law, neither the domicil of David's mother, nor the domicil of David himself had any materiality; for neither is called for by the language of the Statute; nor had the domicil of the father himself at any time anterior to the exercise of his right, for the same reason. Whether the Californian Act required him then to have the status of a domiciled Californian need not be discussed, for he in fact possessed it then, which was the only time when, on the true interpretation of the Statute, it could conceivably matter in California, namely, the moment of his taking action pursuant to the Statute. Since he was then domiciled in California, I cannot see any room for doubt that he then enjoyed, through his status of a man domiciled in California, full personal capacity to confer on his son David whatever status of legitimacy in California the Californian statute intended should be created for a son's benefit. The question of fact as to what the father's domicil had been at the moment of birth (or of conception, as was suggested in some of the early decisions about legitimation by subsequent marriage), or at any intermediate time, cannot, so far as I can see, have any bearing upon the status of David in California, as resulting by operation of Californian law from the action of his father pursuant to the facultative provision of the Californian statute. There is not a word in the section which imposes any such condition upon his power of conferring the status of legitimacy upon his son. If the father's status at the date of those two earlier events has any relevance in this appeal, as my colleagues think it has, it must be solely because English municipal law imposes that limitation in England. If at the moment of the legitimation David's mother had already acquired a Californian domicil (as I think she did some time before 1917), David had equally, as her dependant, a domicil in California. But if that fact is not to be regarded as proved, a question of law may arise for consideration, whether, since in English municipal law domicil is generally a condition precedent to the acquisition of a foreign status, this Court is compelled by that law to refuse recognition of David's legitimacy because he did not then possess a Californian domicil although his father did? I think not, for two reasons: (1.) The Californian statute not only gave him there a status of legitimacy from birth, but it was a necessary incident of that legitimacy that he should automatically come into the dependent relationship of a legitimate son to his father; and as that relationship was inherent in the legitimacy it, too, must be deemed to have attached from birth. This legal presumption would cause David to have had from birth the same domicil as his father—English for the first few years of his life and then from the date of the father's acquisition of his domicil of choice a Californian domicil. (2.) The second reason is wider and all-embracing. The only status that matters at the moment of legitimation is in my opinion that of the father. If he had the capacity to legitimate, the Californian Act did the rest. David's legitimacy in California was equivalent to original legitimacy; he was as legitimate as if he had been born legitimate; and there is, in my opinion, no prohibitory rule in English municipal law which can entitle this Court to refuse to apply the general rule of universality of status which I regard as part of English law. To my mind the supreme importance of attributing universality to status, when created, should give it priority in resolving the problem raised by the apparent conflict with it of the rule of English municipal law, which at first sight seems on the decided cases, to attribute status exclusively to domicil. But that is not necessarily so; for I am not satisfied that English law rejects status, when created by nationality in those countries which act upon that rule, unless domicil as well as nationality is proved. In the second place, it is I think our duty to have regard to the intention of the Californian Act to make a legitimated son wholly legitimate—not from the moment of legitimation but from birth—not only in California but the world over; and to that major consideration of status in private international law the minor consideration of domicil in English municipal law should, I think, give way, and allow the Court to admit that particular origin of status, in a case like the present, as an exception to the normal rule that domicil is the cause of status. There may, perhaps, be added the further consideration that in the continental system, as I believe, the rule of nationality creating status only requires nationality at the moment of legitimation.

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(1) 7 Cl. & F. 895.

There is one more point about domicil which deserves mention, and calls for caution. In the "subsequent marriage" cases there are expressions of judicial opinion to the effect that the reason for insisting on the father's domicil at the date of the birth is because that would give to the child a "potential capacity for future legitimation." Frankly I do not understand that idea; but if it has any solid basis, it might be a ground for praying in aid the fact (which I regard as immaterial) of the father's acquisition of a Californian domicil before July 1, 1917, with its resultant personal capacity in him to resort thereafter to the Californian law of legitimation; and for holding that David in that way had a potential legal nexus with his father from the moment of his father's acquisition of a Californian domicil.

The meaning which, as already appears, I attach to "legitimacy," both under the Californian statute and in English municipal law, calls for a little separate consideration. An absolute sovereign legislature can do what it wills in legislation. It can take a word with a normal meaning in English law and use it with an abnormal meaning: and it can do so either expressly or by necessary implication. In 1926, Parliament when enacting the Legitimacy Act of that year, deliberately passed a half-measure. By s. 1 it not only limited statutory legitimation to the one case of subsequent marriage of the natural parents, but provided that such so-called legitimacy should operate only "from the commencement of the Act or the date of the marriage, whichever last happens"; thus giving to the word "legitimate" an abnormal meaning. But the statutory misuse of a word in a non-normal sense cannot affect its non-statutory and normal meaning. The normal meaning of the word "legitimate" in English municipal law is that the person in question has the legal status of one born of a mother who then possessed in relation to a living husband (having access) the legal status of marriage; or who, if her husband was already dead at the time of the birth, had possessed that status within a possible period of gestation. "Legitimacy" is the status of a child so born. "Legitimation," therefore, in its normal sense is an act of law by which the status of legitimacy is conferred on a person not so born. Parliament could pass a personal Act, a privilegium, or "rescriptum principis," as Bar calls it, saying that A.B., an illegitimate person, shall be made "legitimate," or have the legal status of "legitimacy." Many such "privilegia" were passed in earlier centuries of English history. So also Parliament could—as the Californian Legislature did—pass a general Act enacting automatic legitimation in specified circumstances and conditions; or permitting natural fathers themselves to invoke the law by performing some specific action and thereby to cause the law to abolish the illegitimacy and substitute the status of legitimacy.

At the hearing it was argued for the appellants, that retrospective legitimation is in English law impossible; and, further, that the words "from the time of its birth" at the end of the Californian section must be disregarded in an English Court, because they do not create status but merely constitute retrospective legislation. I do not rely on those words. The Californian Act used the word "legitimate" without any limitation or other qualification; and the word must be there construed in its natural and normal sense. The last six words appear to me to have been inserted only ex majore cautela; they do not add anything to the meaning which the word would have had without them. A statement that a person is "legitimate" means that his condition or status is that of a person born in lawful wedlock, and an enactment of legitimacy must equally mean that. English law has indeed already accepted that principle. In every case of legitimation by subsequent marriage in the English Courts the result was retrospective: for it substituted legitimacy for illegitimacy as from birth. The argument that during the period from birth to the subsequent marriage the bastard was filius nullius and his bastardy indelible, and that, therefore, no subsequent marriage could in English municipal law undo the past, was brushed aside by the Courts, although with the wholly illogical answer, that if the father had been domiciled in the appropriate country during the whole of that period (when ex hypothesi there was no relationship between him and his natural son), it would suffice to confer legitimacy from birth: but under cover of that excuse, the courts did in truth recognize retrospective legitimacy.

Upon the question of the true meaning of "legitimacy" and the necessarily retrospective effect of legitimation, I will pray in aid the argument addressed by Lord Macnaghten, when counsel before Chitty J. in *In re Ullee.* (1) The question was whether the children of an English woman married in due form by a Mahommedan ceremony of marriage to an Indian Moslem Nawab who had already one wife, the marriage being legal in Mahommedan law, but a nullity here because English law forbids the recognition of polygamy, had been made legitimate by his subsequent acknowledgment of them as his children and heirs. His words were: "The Mahommedan law is that, if a man acknowledges another to be "his son, and there is nothing which obviously renders it "impossible that he should be his son, the parentage is "established." He added, referring to the subsequent marriage cases: "Such children are legitimate for all purposes except "as to their status in respect of rights in real property in "England"; an obvious reference to *Birtwhistle* v. *Vardill.* (2) Chitty J. did not purport to decide the question: but said this (3): "That the Mahommedan law allows recognition to "establish legitimacy is clear from the authorities referred to "by Mr. Macnaghten in his argument. To what extent the "English law would in that respect yield to the Mahommedan "law is, as already stated, an open question . . . . I am by "no means satisfied that, according to the principles of "international law as now understood, I ought to hold the "infants now in question to be for the purposes of the "application illegitimate, but it is immaterial to give any "decision on that point." The learned judge was clearly not rejecting the retrospective principle. In the case of *Skottowe* v. *Young* (4), to which I shall refer later, the decision itself accepted the retrospective principle.

I will now refer to some of the decisions (other than *Salvesen's* case (5), and then cite some passages from leading jurists, which I think support the principles of the preceding

(1) (1885) 53 L. T. 711–2.
(2) 7 Cl. & F. 895.
(3) 53 L. T. 713.
(4) (1871) L. R. 11 Eq. 474.
(5) [1927] A. C. 641.

observations. *Monro* v. *Ross* (1) was a case of a claim based on an alleged status of legitimacy acquired through the Scottish law of legitimation by subsequent marriage; but the father had an English domicil, and at no time a Scottish domicil; and the House held that the father's status depended on his domicil and that his son was not legitimated because the law of the father's domicil was English, which did not include the Scottish rule of legitimation by subsequent marriage. *Warrender* v. *Warrender* (2) was the converse case. A Scotsman, whose domicil was in Scotland, married an English woman in England, and spent most of his life there: but he never lost his Scottish domicil. After a time the husband and wife entered into a deed of separation. At a later date, during the separation, whilst the wife was living abroad, the husband started proceedings in the Scottish Courts for dissolution of the marriage on the ground of the wife's adultery. The question was whether that Court had jurisdiction to dissolve the marriage and therefore, to direct service of process abroad on the wife, she being by birth an English woman, and the marriage having taken place in England. The House of Lords held that the husband's domicil gave the Scottish Court jurisdiction to dissolve the marriage. The principles, involved in these two decisions, and relevant to the present case, are that status depends normally on domicil; and that the proper law of the status is the law of the country of the domicil, by which I mean the whole law of that country, as was explained by Maugham J. (as he then was) in *In re Askew* (3), jurisdiction being merely one consequence of the law of the status. These principles were affirmed in the case of *Birtwhistle* v. *Vardill* (4), which was argued before the House of Lords in 1830, again in 1835 and adjourned; it was re-argued in 1839 and decided in 1840. (5) The claim was to the inheritance of land in England by the son of a father and mother not married when he was born, but having a Scottish domicil both at the date of his birth and when they subsequently inter-married. The son became completely legitimate under the law of Scotland, and accordingly, under that law succeeded to his father's estates in Scotland as his lawful heir ; but the English judges advised and the House held that legitimacy is not enough to enable a claimant to succeed to the heirship of land in England, unless the legitimacy arises from actual birth in lawful wedlock, because the common law of England forbids inheritance to English land to any not so born. This view was expressed by the judges in their advice on both occasions, and the reasoned opinion of Tindal C.J. (who had argued for the claimant in the King's Bench), which was delivered by him for the judges at the final hearing (July 1839), was treated by the House as clearly demonstrating that there was in England a positive and inflexible rule of law which absolutely forbade a son not born in wedlock succeeding as heir to English land. The ratio decidendi is not relevant to any point in this appeal : but the case could not have been argued at all except upon the footing of the English Courts recognizing and applying the Scottish status of full legitimation, unless so prevented by a positive prohibition ; and there are certain passages both in the advice of the judges on each occasion and in the opinions of their Lordships, which are weighty expressions of opinion on domicil, status and legitimation. In the advice of the judges at the first hearing, delivered by Alexander C.B. (1), there is a passage, quoting Lord Stowell in *Dalrymple* v. *Dalrymple* (2) in which it was said that the question of the status of the claimant must be adjudicated "'according to the principles of "'English law applicable to such a case ; but the only principle "'applicable to such a case by the law of England is, that the "'status or condition of the claimant must be tried by reference "'to the law of the country where the status originated : "'having furnished this principle, the law of England with-"'draws altogether, and leaves the question of status in the "'case put to the law of Scotland.' Such is the sentiment of "that great Judge, and such is his language, varied only so far "as to apply to a question of legitimacy what was said of a

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(1) (1830) 4 Wil. & Shaw (H. L.) 289.

(2) (1835) 2 Cl. & F. 488.

(3) [1930] 2 Ch. 259.

(4) (1835) 2 Cl. & F. 571.

(5) 7 Cl. & F. 895.

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(1) 2 Cl. & F. 574.

(2) (1811) 2 Hag. Cons. 54, 58.

"question respecting the validity of a marriage. When the "question of personal status has been settled upon these "principles, when it has been ascertained what the claimant's "character and situation are, it becomes then necessary to "inquire what are the rules and maxims of inheritance which "the law of that country where the inheritance is placed, and "whose tribunals are to decide upon it, has stamped and "impressed upon the land in debate." He said (1): "The "comity between nations is conclusive to give to the claimant "the character of the eldest legitimate son of his father, and "to give him all the rights which are necessarily consequent upon "that character; but what these rights are respecting English "land must be left to the law of England, and the comity is "totally ineffectual to alter, in the slightest degree, the rules "of inheritance and descent which the law of England has "attached to this English land"; and he added (2): "The "distinction to which I am directing your Lordships' attention "is very familiar to foreign jurists, and is noticed by them as "the difference between real and personal status; the last "being those which respect the person, and follow it every-"where; the first being those which are connected with the "land, and adhere to it, and are as immoveable as the subject "to which they are applied." It is to be observed in the passages quoted (3), that the judges expressed opinions directly relevant to the present case, which I venture to paraphrase thus: (1.) By private international law, as applied in English Courts, a person's status of legitimacy created by the law of the country of his domicil by reason of his domicil there extends everywhere, and must accordingly be recognized by English Courts as the same status: (2.) All those rights which respect the person, as distinct from those which respect realty in England, must by the law of England be recognized and enforced by English Courts. On the second hearing four years later in July, 1839, Tindal C.J., in a fully reasoned opinion of extraordinary interest, in which, he submitted (4) that the law of inheritance in England was fatal to the claimant, did express the view that a marriage valid by the law of the parties' domicil would be held valid everywhere; and, I think, he implicitly accepted the principle that a party legitimate in one country is to be held legitimate all over the world. He also drew attention (1), to some of the curious fictions upon which legitimation by subsequent marriage between the natural parents had been justified: as, for instance, the Scottish theory that they had made an actual contract of marriage at the time of conception. This fiction had been referred to by Lord Cottenham L.C. in the two previous cases (*Dalhousie* v. *M'Douall* (2) and *Munro* v. *Munro* (3) a joint judgment in which was given (4) on the same day as the judgment in *Birtwhistle* v. *Vardill* (5): "To whatever principle "the law of legitimation by subsequent marriage is attributed, "there can be no doubt of the generality of the rule, where "the parents were capable of contracting marriage at the birth "or conception of the child. Wherever, therefore, a marriage "follows the birth of children procreated by the parties to the "marriage, all the requisites concur which are required by the "terms in which the rule is laid down, assuming always that "the circumstances are such as to bring the case within the "operation of the law of Scotland, and as the laws of every "country generally affect all those who have their domicile "in such country, it would appear that, in order to bring any "particular case within this rule of the law of Scotland, it "could only be necessary to show that the domicile of the "parties was Scotch. The consideration is of much importance "in a case in which it is said that no precedent can be found in "which the particular facts of this case occurred; because if "the case falls within the terms of the general rule, such rule "must govern it, unless it can be shown that there is principle "or authority for making it an exception to the general rule, "and withdrawing it from its operation." Effect was given to this principle on the facts of both cases. It is incidentally to be observed that Lord Brougham, in his opinion in *Munro* v.

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(1) 2 Cl. & F. 575.

(2) Ibid. 576.

(3) Ibid. 575–6.

(4) 7 Cl. & F. 934–5.

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(1) 7 Cl. & F. 934–6.
(2) (1840) 7 Cl. & F. 817.
(3) 7 Cl. & F. 842.
(4) 7 Cl. & F. 871–2.
(5) Ibid. 895.

*Munro* (1), twice refers to the necessity of the Scottish domicil of the "parties" at the time of the marriage, but makes no reference to any such necessity at the time of the conception or birth.

In *Shaw* v. *Gould* (2) Lord Cranworth said of *Birtwhistle* v. *Vardill* (3), that the opinions there given "seem to me to show "a strong bias towards the doctrine that the question of "status must, for all purposes unaffected by the feudal law, "as adopted and acted on in this country, be decided by the "law of the domicile."

*Skottowe* v. *Young* (4) was a case of legitimation of two illegitimate daughters by the father's declaration under French law upon his subsequent marriage with the mother, he being an Englishman then and from before their birth domiciled in France. The grandfather had made a will leaving land in England to trustees to sell and hold the proceeds in trust "for his children." The Inland Revenue claimed legacy duty at the higher rate, contending that the two daughters were "strangers in blood" within s. 2 of the Legacy Duty Act, 1815, (5) and not conceding the lower 1 per cent. rate payable on legacies to legitimate children. Sir John Stuart V.-C. said: "If, as seems clear, the daughters of the "testator are legitimate by the law of France, and must, "therefore, in this country be considered as having the status "of children, it is difficult to see how, in any sense, they can be "'strangers in blood.' Where the Legacy Duty Act uses "these words, it is as a description of the status of the person." After distinguishing *Birtwhistle* v. *Vardill* (6) he concluded: "The status of these ladies being that of daughters legitimated "according to the law of France by a declaration of the father, "it is impossible to hold that they are for any purpose strangers "in blood, on the mere ground that, if they had been English "and their father domiciled in England, they would have been "illegitimate." And he held that the legitimated children were not "strangers in blood." In *In re Goodman's Trust* (7), Cotton L.J. quoted *Skottowe* v. *Young* (8) with approval.

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(1) 7 Cl. & F. 842.
(2) L. R. 3 H. L. 55, 70.
(3) 7 Cl. & F. 895.
(4) L. R. 11 Eq. 474.
(5) Now Stamp Act, 1815, see Short Titles Act, 1896.
(6) 7 Cl. & F. 895.
(7) 17 Ch. D. 266.
(8) L. R. 11 Eq. 474, 477.

*Sottomayor* v. *De Barros* (1) is an instance of a disability or incapacity, attaching to a person's status under the law of his domicil, being enforced by our Courts, although in English municipal law the circumstances would entail no disability; the Court added: "All persons are legally bound to take "notice of the laws of the country where they are domiciled."

In *Harvey* v. *Farnie* (2) the Court of Appeal recognized as valid the decree of a Scottish Court dissolving the marriage of a domiciled Scotsman and an English woman, although the marriage was solemnized in England, and was dissolved upon a ground for which by English law no divorce could have been granted. The case came before the Court on a petition by second wife whom the respondent had married after obtaining his divorce in the Scottish Courts, asking for a declaration of the nullity of the first marriage. Cotton L.J. discussed the legal incidents and liabilities of the status due to domicil and said (3): "I take and adopt entirely what was said by Lord "Westbury in the case of *Shaw* v. *Gould* (4) 'But this right to "'reject a foreign sentence of divorce cannot rest on the "'principle stated by the Vice-Chancellor in his judgment, "'namely, that where by the lex loci contractus the marriage "'is indissoluble, it cannot be dissolved by the sentence of any "'tribunal. Such a principle is at variance with the best "'established rules of universal jurisprudence, that is to say, "'with those rules which for the sake of general convenience "'and by tacit consent are received by Christian nations and "'observed in their tribunals. One of these rules certainly is, "'that questions of personal status depend on the law of the "'actual domicil.'" The case went to the House of Lords. (5) Lord Selborne L.C. said (6): "Now, I must take the liberty "of saying that if this question is to be tested upon principle "apart from authority, although it cannot be denied that the "varying jurisprudence, and perhaps legislation also, of "different countries may and do introduce some undesirable "cases of conflict between the laws of those different countries

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(1) (1877) 3 P. D. 1, 6.
(2) (1880) 6 P. D. 35.
(3) Ibid. 48.
(4) L. R. 3 H. L. 55, 94.
(5) (1882) 8 App. Cas. 43.
(6) Ibid. 50.

"on questions of matrimonial status, yet I should certainly "say that in such circumstances as those which exist in the "present case the principles of private international law "point in the direction of the validity of such a sentence and "of its recognition by the Courts of other countries. Of "course I assume that in the way of that recognition there "would not be interposed any positive legislation bearing "upon the point, or any positive prohibition of its own law "binding upon the Court in which the question arises." Lord Blackburn said (1): "Seeing that there was this complete "domicil, which almost every writer and speaker upon the "subject has regarded as certainly the most important element "in considering what the status of married people is, and the "status of those divorced from a marriage (this was in its "origin a Scotch domicil from the very beginning), the only "ground upon which it has been said that a Scotch Court "could not divorce the parties was that the actual marriage, "the contract, was made in England. I do not myself see "why upon any principle that should make any difference."

In *Le Mesurier* v. *Le Mesurier* (2) a case about so-called "matrimonial domicil," Lord Watson, delivering the judgment of the Privy Council, reviewed a large number of authorities, and emphasized (3) the importance of English judges paying attention to the opinions of leading international jurists: "It is a circumstance not undeserving of notice that the learned "judges, whether English or Scottish, who have expressed "judicial opinions in favour of a matrimonial domicil, have "abstained from reference to those treatises on international "law which are generally regarded as authoritative, in the "absence of any municipal law to the contrary. The reason "for their abstinence is probably to be found in the circumstance "that nothing could be extracted from these sources favourable "to the view which they took. Their Lordships are of opinion "that in deciding the present case, on appeal from a colony "which is governed by the principles of the Roman-Dutch "law, these authorities ought not to be overlooked. Huber

(1) 8 App. Cas. 43, 58.

(2) [1895] A. C. 517.

(3) Ibid. 537.

"(Lib. 1, tit. 3, s. 2, De Confl., Leg.) states the rule of international law in these terms: 'Rectores imperiorum id "'comiter agunt, ut jura cujusque populi intra terminos ejus "'exercita teneant ubique suam vim, quatenus nihil potestati "'aut juri alterius imperantis ejusque civium praejudicetur.' "That passage was cited with approbation by Lord Cranworth "and Lord Westbury in *Shaw* v. *Gould*. (1) To the same effect, "but in language more pointed, is the text of Rodenburg "De Stat. Divers. tit. 1, c. 3, s. 4), cited in the same case by "Lord Westbury: 'Unicum hoc ipsa rei natura ac necessitas "'invexit, ut cum de statu et conditione hominum quaeritur, "'uni solummodo Judici, et quidem Domicilii, universum in "'illa jus sit attributum.'" A few lines below he added: "There can, in their Lordships' opinion, be no satisfactory "canon of international law, regulating jurisdiction in divorce "cases, which is not capable of being enunciated with sufficient "precision to ensure practical uniformity in its application." In my humble opinion it is of comparable, if not equal, importance that a person made legitimate from birth in one country should be equally so legitimate in every other. The rule that a judgment by a competent court on status has the effect everywhere of a judgment in rem, is a powerful reason why the powers and limitations, the capacities and incapacities, the rights and liabilities, of that status should prima facie be the same everywhere.

The propositions of law resulting, in my opinion, from the cases I have cited may be thus expressed: when a given status has been shown to have been created or recognized by the law of a foreign country, and the mode of its creation is such as our courts can recognize, English law will enforce that status so far as concerns the rights, capacities and obligations of that person; will by proper evidence ascertain its content and consequences; and will apply the proper law of that status accordingly; unless there is some definite prohibition or command of English municipal law, written or unwritten, which constitutes an exception and makes it the duty of the Court to refuse, in whole or in part, to recognize, or give effect to

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(1) L. R. 3 H. L. 55, 72, 83.

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the status in question. Illustrations of such an exception are afforded by the special rule in regard to the inheritance of English land (*Birtwhistle* v. *Vardill* (1) ) ; or where recognition would be contra bonos mores, as in the case of a penal status such as slavery, and of a marriage which is incestuous or polygamous and contrary to Christian morality ; or where an Act of our Parliament has expressly directed that in certain circumstances our Courts shall modify the law of the status, or use some defined measure of discretion in applying it. An instance of the last exception is afforded by the effect of the Guardianship of Infants Act, 1925, upon the status of a foreign guardian : see *'B——'s Settlements* (2) where Morton J. treated the complete recognition in English law of the status of a guardian duly constituted by foreign law as modified by the statutory command of that Act, that "In any proceeding where "the custody of an infant is in question, the Court, in deciding "that question, shall regard the welfare of the infant as the "first and paramount consideration." In consequence of that sovereign command he held, that the principle of complete recognition in English law of such a guardian's status (which had been explicitly affirmed by Page Wood, V.-C. in *Nugent* v. *Vetzera* (3) was to that extent modified, and he accordingly exercised a measure of discretion.

If there be such a general principle of universality in the law of status, it follows in the present case that, unless there be some particular and positive prohibition or exception of English municipal law, applying to such a legitimation as was effected by the father under his statutory powers, the status of complete legitimacy which resulted in California must be recognized in England with all its attributes. The old common law rule, that " the stain of bastardy is indelible," cannot in principle constitute such an excepted case ; nor did it in the decisions which I have cited, or in *In re Goodman's Trust* (4) ; so to treat it would indeed be to " visit the sins of the fathers "upon the children to the third and fourth generation " without legal justification. It follows in my opinion that the decision of Farwell J. was right, unless the particular ground stated in my colleagues' judgment constitutes a valid exception to it. For that they rely on the English decisions and certain expressions of opinion by Lord Hatherley L.C. in a Scottish appeal in the House of Lords.

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(1) 7 Cl. & F. 895.
(2) Ante, p. 54.
(3) (1866) L. R. 2 Eq. 704, 712.
(4) 17 Ch. D. 266.

*In re Wright's Will Trusts* (1) is the first, a case decided by Lord Hatherley when he was Sir W. Page Wood V.-C. There all the requisites of French law for the legitimation of a child, born illegitimate, by the subsequent marriage of his parents were present to produce in France the status of legitimacy; but the father at the time of the birth was still domiciled in England; and the Vice-Chancellor held that that fact was in English law fatal to the recognition of the legitimacy under French law, and rejected the claim to succeed, even to personalty, on the ground that the claimant was not a " child " of the father under a trust of the grandfather's will. His first reason for so deciding was that he thought the doctrine of legitimation by subsequent marriage was based on the old fiction of the Roman law that the marriage could be treated as evidence of a contract to marry, entered into at the time of the connection of which the child was the fruit (2); and he added (3): " It is very important again to go back to the "theory that it [the French rule] must rest upon contract in "some way or other," and " that shows that the [French] "law must depend wholly upon the theory of a contract." His second reason was the English legal maxim of " the "indelibility of bastardy "; for he recognized the general rule that the status of legitimacy, once conferred by the operation of the law of the father's domicil, becomes universal (4) and I think he saw in the maxim a way out of a decision which seemed to him wrong. The grounds for his decision are, perhaps, contained in the following two sentences (5): " On every point of principle, the law of the "father's domicil having fastened on the child, I am driven "to this dilemma: if the child be legitimate it is the child

(1) 2 K. & J. 595.
(2) Ibid. 604.
(3) Ibid. 605.
(4) Ibid. 610.
(5) Ibid. 612.

"of one who, at its birth, was a domiciled Englishman; but "if that is admitted, and it is conceded that the child was "born before marriage, it must be illegitimate, for it has no "father by the English law, and nothing can afterwards "establish any relationship between the putative father and "the child. Again, placing the legitimacy on the foundation "of a contract at the conception, the French lawyers hold "that if there is any obstacle at the time of the conception of "the child it can never be made legitimate; and as a contract "that the child should be afterwards rendered legitimate by "marriage, could not be entered into by a domiciled English-"man, the child must necessarily be illegitimate, and must "belong to the mother, and it would be immaterial that she "was ignorant of that legal obstacle." In the penultimate paragraph of his judgment the learned Vice-Chancellor appears to have been greatly impressed by the argument ab inconvenienti. That "inconvenience" may result from "conflict "of laws" is indisputable; but there are two answers to this argument: (1.) That it is to the general convenience of mankind that the same status, and the "proper" law of the status, should prevail everywhere; and (2.) that the ethical consideration of not punishing the innocent ought to weigh in the balance against the objection based on inconvenience. Why should the child born illegitimate suffer for his father's sins? And why if the law, written or unwritten, ordains that he shall ex post facto become legitimate, should he be doing his brothers and sisters of the half-blood a moral injury by sharing with them in his father's fortune, any more than in the case where they have to accept that fate through a lawful and fertile second marriage of their father? If we look at it from their side, and consider their conscience, surely, their moral duty to the half-blood is just as bounden—and just as "convenient" in the true sense of that word—as to the whole blood. But leaving on one side these arguments against the extension of that peculiar exception to other forms of legitimation, it is worth noting that in all cases of legitimation by subsequent marriage there is necessarily one feature which distinguishes them from all other legal forms or methods of legitimation. The juridical origin of the doctrine may be the Roman law; or the Civil or Canon law, as it probably was in France and possibly in Scotland; but it seems to be universally recognized in countries where that doctrine obtains, that the subsequent marriage entails, so to speak, a social recognition of the original cohabitation; and if that postulate be accepted as the first premise, the further step may not in those cases be wholly illogical, namely, of requiring that the father's status should have been the same at both dates. But, fortunately, law does not depend wholly on logic, as Lord Halsbury said in *Quinn* v. *Leathem.* (1)

In *Udny* v. *Udny* (2), the only questions in issue were about domicil—as to the abandonment of the domicil of origin, the acquisition of a domicil of choice, and the revivor of the domicil of origin. It is true that the Lord Chancellor expressed views (3) as to the necessity of the Scottish domicil at the time of the birth as well as of the marriage, and said he "saw no "reason to retract his opinion," which he had expressed as Vice-Chancellor in *In re Wright's Will Trusts* (4), but however weighty his later affirmation of opinion is, it was not necessary to the decision of the case; and the appeal was a Scottish appeal. The question whether for legitimation by subsequent marriage under foreign law, it is a requisite of private international law as administered in England that the father should have had the foreign domicil at the time of the birth, did not arise at all in *In re Goodman's Trusts* (5), as the same domicil obtained at both dates; but it did arise in *In re Grove* (6); and Cotton L.J. (7) purported to follow and apply the passage in Lord Hatherley's opinion in *Udny* v. *Udny* (2), to which I have just referred. The result of the case has already been stated in my colleagues' judgment; and so far as that mode of legitimation is concerned, *In re Grove* (6) is binding on this Court, unless its authority has been undermined since by superior judicial authority. Whether what has been said upon the law of status in the House of Lords in

(1) [1901] A. C. 506.
(2) L. R. 1 H. L. (Sc.) 441.
(3) Ibid. 447–8.
(4) 2 K. & J. 595.
(5) 17 Ch. D. 266.
(6) 40 Ch. D. 216.
(7) Ibid. 232–3.

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subsequent cases—for example, *Salvesen's* case (1)—has weakened the decision in *In re Grove* (2), I do not propose to discuss; for I humbly conceive that the material considerations affecting the doctrine of legitimation by subsequent marriage are widely, if not wholly, different to those affecting an act of legitimation by a father in the country of his domicil pursuant to a local statute. In connection with Lord Hatherley's views about status in private international law, it is a curious fact that having decided *In re Wright's Will Trusts* (3) in 1856, he, as Vice-Chancellor, had before him in 1863 *Boyes* v. *Bedale* (4), a claim of a natural son to succeed to personalty under a grandfather's will, in which he refused to apply the principle of legitimation by subsequent marriage, in spite of the father having had a French domicil both at the time of the marriage and at the earlier date of the birth. This decision was over-ruled in *In re Goodman's Trusts* (5), per Cotton L.J. (see the comments in Foote's Private International Law (5th ed.), p. 118). There is no trace in the judgment of the Vice-Chancellor in *In re Wright's Will Trusts* (3) of the metaphysical view expressed by Cotton L.J. in *In re Grove* (6), which is quoted by my colleagues: "What is really "necessary, I think, is that the father should at the time of "the birth of the child be domiciled in a country allowing "legitimation, so as to give to the child the capacity of being "made legitimate by a subsequent marriage." I confess that the very idea of attributing to a newly born child, to a filius nullius, a sort of latent capacity for legitimation at the hands of the natural father to whom he is denied any legal relation, seems to me an even more absurd legal fiction, and even less convincing, than the mythical contract of marriage supposed by the canonists to have been entered into at the moment of procreation. I can see no warrant for applying a rule, originating in the special reasons of the doctrine of legitimation by subsequent marriage, and justified by various legal fictions invented to support it, to the simple and straightforward case of a direct command of legitimation by the statute law of the father's domicil: for I think that a statute which ordains legitimation upon the performance of specified acts or conditions, is as mandatory as a privilegium. The Californian statute contains no reference whatever, express or implied, to any requirement of domicil at the date of birth. It is English law alone which can justify my colleagues' view.

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(1) [1927] A. C. 641.
(2) 40 Ch. D 216.
(3) 2 K. & J. 595.
(4) (1863) 1 H. & M. 798.
(5) 17 Ch. D. 266, 296.
(6) 40 Ch. D. 232.

Having dealt with the judicial authorities, I now come to the jurists. Although private international law is a branch of English law, their opinions are of great weight, as was pointed out in the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier* (1) from which I have already quoted.

Before, however, citing support for my main reasoning, I want to show, from Lord Fraser's standard book on Parent and Child, how little historical backing there is behind Cotton L.J.'s fictional theory of an early contract underlying the Scottish law of legitimation by subsequent marriage. Even if in that one kind of legitimation it is too late for the Court of Appeal to question the requirement of the father's domicil at the child's birth as a rule of English municipal law, the absence in Scottish history of any real justification for the theory affords additional ground for not extending that rule to any other kind of legitimation. In the 3rd edition (1906), at p. 39, he says: "The canonist commentators based the law . . . . "upon a fiction . . . . Assuming it to be a general rule, that "children are not legitimate unless born in lawful wedlock, "they declared the principle to be, that the parents were "fictione juris married at the birth of the child; and by this "fiction they avoided the necessity for violating a general rule. "The point was elaborately discussed in a late case; and the "decision of the Court rejected the fiction, holding the law "to be based solely on views of expediency. In a previous "case, Lord Gillies had well observed: 'The legal fiction is "'not the foundation of the rule. The rule is founded on "'principles of justice or expediency; and the fiction is "'resorted to merely to explain and reconcile it to the prin- "'ciples or notions of the lawyers of the time.'" On page 40 he says: "The legitimation of previous offspring is not a matter "for which the father and mother could contract or stipulate, "or which can be given or withheld according to what may be "proved or inferred as to their purposes or understanding. It "is, on the contrary, the gift or legal result of the law, as "applicable to certain facts and circumstances; the value and "effect of which must be judged of by the law alone, independent altogether of the intentions or expectations of the "parties."

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(1) [1895] A. C. 517.

For my main thesis I begin with the passages from H *~~K~~uber* and *Rodenburg*, which I have already cited from Lord Watson's judgment in *Le Mesurier's* case (1). They treat the "status" of the person as the source of his personal law; and domicil they regard merely as the factor which brings into operation the local law which creates the status; but the great importance of their opinion is that they affirm the general rule that the status, once established in the country of the domicil, is to be accepted in every other country.

Savigny in his Conflict of Laws (2nd ed., 1880, translated and edited by W. Guthrie of the Scots bar), under the heading of "Paternal Power" at p. 302, expresses the opinion, quite categorically, that legitimation by subsequent marriage is regulated according to the father's domicil at the time of the marriage only, and that it does not matter what his domicil was at the time of the birth of the child. He rejects the views that the pre-marriage child can, before the subsequent marriage, have any rights, potential or actual, in relation to his father. It is the father's voluntary recognition at the time of the marriage, which alone creates a relationship and confers the legitimacy.

Lafleur, Professor of International Law at McGill University and a Quebec lawyer, in his Conflict of Laws (Montreal 1898) at pp. 78 and 79, cites this passage of Savigny and adds: "This view appears to be founded on sound reasoning and "should, it is submitted, be adopted by our Courts."

L. von Bar (2nd ed., in English, 1892 Edinburgh) of whom Sir R. Phillimore had a high opinion (see his Private

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(1) [1895] A. C. 517.

International Law (3rd ed.) s. 385), takes the same view as Savigny (s. 192, at p. 434): "Legitimation of bastards, "either by subsequent marriage or by an Act of the Govern"ment (rescriptum principis), is nothing but a legal equaliza"tion of certain children, illegitimately begotten, with legiti"mate children. The law which rules the rights of legitimate "children must therefore regulate the legitimation of bastards; "and as the former are subject to the actual personal law of "the father, the letter must be determined also by the personal "law of the father at the date when the fact said to infer "legitimation took place. If, then, there is a question of "legitimation per subsequens matrimonium, the child is "legitimate, if that is the result of the personal law which the "father enjoyed at the time of the marriage. This is now the "prevailing view." The phrase "legal equalization" goes to the very root of the problem of the retrospective effect of legitimation raised by this appeal.

Westlake (4th ed.—the last by himself—1905) shares the views of Savigny, Lafleur and Bar, that for legitimation by subsequent marriage the only requisite is the domicil of the father at the date of the marriage (ss. 54 and 55). He construes Lord Brougham's opinion in *Dalhousie* v. *M'Douall* and *Munro* v. *Munro* (1), on which I have already commented, as plainly implying that the father's domicil at the date of the birth is immaterial. In s. 247 he adds, what is indeed implicit in the new relationship of father and dependent infant: "If and as soon as a child born out of wedlock is legitimated, "being a minor, the domicile of its father at the time of such "legitimation becomes its domicile."

Phillimore in his Private International Law (1st ed. 1861), c. XVII, took the view of the law of status which I have been expressing, in s. 371: "The position, however, already stated, "namely, that the law of the domicil determines the status, "and therefore, travels with the person, binding on him all its "capacities and incapacities, wherever he goes—rests, as an "abstract proposition, upon a very largely preponderating "authority of jurists—upon the recognition of it by courts of

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(1) 7 Cl. & F. 872.

"justice—and has, moreover, been expressly incorporated into "the positive legislation of the principal States on the European "Continent"; and the section is reprinted in the same words in the 3rd ed. (1889) edited by Sir Walter Phillimore (as he then was). Neighbouring sections touch on nationality as an alternative to domicil in continental law; but in 1861 the clear demarcation between the two bases of status was perhaps not realized. In s. 542, whilst conceding that legitimation occurring by the authority of the State "evidenced by "some public act, as in England by an Act of Parliament, or "in other countries by the decree of the sovereign (per "rescriptum principis), might give rise to an international "question of some nicety," the author adds "though reason "and principle are in favour of the recognition by other "countries of such legitimation, where it is valid lege domicilii." He then cites the opinion of Schäffner "that the legitimatio "per rescriptum principis is good and valid everywhere, if "good and valid by the law of the domicil, and that the lex "loci rei sitae has no bearing (even in case of realty) upon the "question, which is one purely of status."

Story published the 1st ed. of his Conflict of Laws in 1834, the second in January 1841, and the third in 1846. He discussed the English and Scotch cases connected with legitimation by subsequent marriage in the second, but had not then seen the judgments in the House of Lords: these he discussed in the third edition—the last edited by himself. I quote from the 8th (Bigelow's) ed. (1883 Boston). At the outset of his c. IV. on Capacity of Persons (s. 51 on Personal Laws) the great lawyer summarises the opinions of foreign jurists on the international law of status in terms which support the three general principles expressed about status in this judgment: namely, that (1.) it arises by the law of the country of the domicil; (2.) once established there, it extends to every other country; and (3.) it is the same everywhere (8th ed., pp. 67 and 68; identical with the 1st ed.): "All laws which have for "their principal object the regulation of the capacity, state, "and condition of persons, have been treated by foreign "jurists generally as personal laws. They are by them divided "into two sorts; those which are universal, and those which "are special. The former (universal laws) regulate universally "the capacity, state and condition of persons, such as their "minority, majority, emancipation, and power of administration of their own affairs. The latter (special laws) create an "ability or a disability to do certain acts, leaving the party in "all other respects with his general capacity or incapacity. "But whether laws purely personal belong to the one class "or to the other, they are for the most part held by foreign "jurists to be of absolute obligation everywhere, when they "have once attached upon the person by the law of his "domicil. Boullenois has stated the doctrine among his "general principles. Personal laws, says he, affect the person "with a quality which is inherent in him, and his person is the "same everywhere. Laws purely personal, whether universal "or particular, extend themselves everywhere; that is to say, "a man is everywhere deemed in the same state, whether "universal or particular, by which he is affected by the law of "his domicil." Amongst other earlier jurists he cites the very passage from Rodenburg which Lord Watson quoted in *Le Mesurier's* case (1), already cited by me. The whole section is relevant to the present appeal, and especially to the cleavage of opinion between my colleagues and myself. There follows in the chapter an elaborate discussion and analysis of the writings of very many jurists on various aspects of the law of personal capacity, which points out the many disagreements which appear. In the end I think his own opinion remains that which he expresses in s. 51. He discusses legitimation by subsequent marriage in a series of many sections, from 93 to 93 (*v*). In 93 (*m*) he says: "The weight of foreign authority "would, therefore, on the whole, seem decidedly to preponderate in favour of the rule that an illegitimate person, "who by the subsequent marriage of his parents becomes "legitimated as heir by the law of his domicil, ought to be "deemed such as to the inheritance of land in all other "countries, at least where it is not expressly prohibited by the "terms of the local law that such a person, born before

(1) [1895] A. C. 517.

"marriage, should inherit." He states his general conclusions on status in ss. 98 to 106. In s. 98 (whilst implicitly recognizing the complete sovereignty of each nation) he sums up his own views thus: "The proper conclusion, then, to be drawn from "this review of the subject is, that the rule of Huberus is "correct, that no nation is under any obligation to give effect "to the laws of any other nation which are prejudicial to itself, "or to its own citizens; that in all cases every nation must "judge for itself what foreign laws are so prejudicial or not; "and that, in cases not so prejudicial, a spirit of comity and "a sense of mutual utility ought to induce every nation to "allow full force and effect to the laws of every other nation." Sect. 101 is directly in point in this appeal, as it bears on the act of legitimation by the father in California, the country of his domicil: "Acts in the country of domicil. First: The "capacity, state, and condition of persons according to the law "of their domicil will generally be regarded as to acts done, "rights acquired, and contracts made in the place of their "domicil, touching property situate therein. If these acts, "rights and contracts have validity there, they will be held "equally valid everywhere. If invalid there, they will be "held invalid everywhere." The words "acts done" cover the legitimation of David by his father.

I do not discuss the passages in Dicey cited by my colleagues. The question is whether his tentative views of the result of English decisions are well founded. It is well to bear in mind the historical stage in the growth of private international law at which Story wrote. Jurists were still confusing their statements of first principles by failing to realize that the secondary qualifications and exceptions, which the laws of particular countries made inevitable, could not be expressed as part of the primary propositions themselves in which the principles were formulated. Indeed, there was still confusion of thought as to which were first principles, and which exceptions, and which were causes and which were consequences; and judicial pronouncements in England and Scotland were not always free from confusion. Dicey's analysis of English decisions in the form of rules and exceptions, often tentative because the ground was not covered or doubts remained, was not even to begin till 1879 when he published his book on Domicil. If the preponderant opinion of all the jurists down to 1846 was what Story's researches led him to think, it follows that, in their view and his view, the complete legitimacy conferred on David by Californian law would "extend to "England and be the same" here as there, unless the application of the primary law of status were shown to be prevented by some definite prohibition or other exception of English municipal law, clearly established. No such prohibition or exception can, in my opinion, be found in the peculiar rule, developed in *In re Wright's Will Trusts* (1) and *In re Grove* (2) out of the mist and varying theories of legitimation by subsequent marriage, upon which the father's domicil at the date of the child's birth was held to be a condition precedent to that cause of legitimation; although the rule of English heirship to land, laid down in *Birtwhistle* v. *Vardill* (3), does satisfy the requirements of such an exception. Whether the *Wright-Grove* rule was logical, or whether it was influenced by the ancient belief of lawyers in "the indelibility of bastardy," it is not, I think, open to this Court to discuss: but the reasons for that rule are, in my opinion, too special and too remote from anything relevant to the Californian statute, to be germane in principle to the present appeal; and when to that test of relevance is added the repudiation of the rule by so many leading jurists, on grounds of legal principle and of comity, I think it is wrong to apply it here. I should have dismissed the appeal; but dis aliter visum, and it will be allowed.

*Appeal allowed.*

*Leave to appeal to the House of Lords.*

Solicitors: *Kenneth Brown, Baker, Baker; Crane & Hawkins; Stibbard, Gibson & Co.*

H. C. G.

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(1) 2 K. &J. 595.
(2) 40 Ch. D. 216.
(3) 7 Cl. & F. 895.

BENNETT J.

1940

July 11, 12.

Applied. In re SMALLWOOD, DECD. [1951] 1 Ch. 369

## *In re* VRINT.

## VRINT *v.* SWAIN.

[1940. V. 100.]

*Evidence—Wife disinherited—Application for maintenance out of husband's estate—Evidence tendered by executor—Whether limited to material being legal evidence in the strict sense—Inheritance (Family Provision) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-s.* 7.

*Will—Wife disinherited—Application for maintenance out of testator's estate—Net estate very small—Whether application well founded—Inheritance (Family Provision) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1.

The meaning of the word "evidence" in s. 1, sub-s. 7, of the Inheritance (Family Provision) Act, 1938, is not limited to legal evidence in the strict sense and, accordingly, the sub-section enables the Court to admit any material such as persons outside a court of law take into consideration in deciding how to act.

The purpose of the Act is to provide out of a testator's estate reasonable maintenance for his dependants and not legacies for them; accordingly, when an estate is too small to provide such maintenance, an application under the Act cannot be entertained.

ADJOURNED SUMMONS.

In 1914 Albert Edward Vrint (hereinafter called "the testator") married Nellie Esther Vrint (hereinafter called "the plaintiff"), a widow, who had a son by a previous marriage. There was one child of the marriage, a son born in 1915. By his will, dated September 27, 1935, the testator bequeathed all his property absolutely to Clifford Eric Swain (hereinafter called "the defendant"), whom he appointed sole executor thereof. He died on November 9, 1939, his net estate amounting to 138*l.* 14*s.* 10*d.* On January 29, 1940, the plaintiff took out a summons, asking that, pursuant to s. 1 of the Inheritance (Family Provision) Act, 1938, the Court should order reasonable provision for her maintenance to be made out of his estate. Her sole source of income was a widow's pension of 10*s.* a week. She was fifty-eight years old, and at the age of sixty years she would become entitled in place of the widow's pension, to an old age pension of 10*s.* a week.

In September, 1935, the plaintiff had taken proceedings for maintenance against the testator in the police court, and an order had been made thereon on September 20, 1935. In contemplation of the hearing, his solicitor had prepared, in the ordinary course of business, on his oral instructions, a proof of the evidence which he was ready to give. It had been dictated by the solicitor to a typist, by whom it was transcribed, and had then been sent to the testator, who had returned it without correction, but unsigned and without any covering letter. Counsel for the defendant now tendered it in evidence to enable the Court to ascertain what were the testator's reasons for the provisions he made in his will. Counsel for the defendant objected that it was inadmissible.

*C. A. M. Blake* for the plaintiff. The evidence tendered is not admissible at common law, under the Evidence Act, 1938, or under s. 1, sub-s. 7, of the Inheritance (Family Provision) Act, 1938.

*P. B. Morle* for the defendant. In probate practice even oral declarations by a testator are admissible as secondary evidence of the contents of a lost will. By analogy the evidence now tendered is also admissible, to show the testator's reasons for making his will. "Evidence" in s. 1, sub-s. 7, of the Act covers not only what has hitherto been legal evidence but also all such material as persons are accustomed to act on outside a court of law. Any other interpretation would render the sub-section superfluous. The evidence made admissible by it is not confined to a "statement in writing "signed by the testator and dated." That is only an example of the sort of material which may be accepted by the Court.

*C. A. M. Blake.* The very word used in the sub-section is "evidence." If Parliament had meant the Courts to accept material which was not strictly legal evidence it would have inserted some qualifying words. A virtual suspension of all the rules of evidence should have been clearly expressed if it had been intended. In the sub-section Parliament specifically indicated the sort of document to be admitted, one signed by the testator and dated. No others are admissible.

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BENNETT J. The application before the Court is under s. 1 of the Inheritance (Family Provision) Act, 1938. By sub-s. 1: "Where . . . . a person dies domiciled in England "leaving—(*a*) a wife . . . . and leaving a will, then, if the "court on application by or on behalf of any such wife . . . . "(in this Act referred to as a 'dependant' of the testator) "is of opinion that the will does not make reasonable provision "for the maintenance of that dependant, the court may "order that such reasonable provision as the court thinks fit "shall . . . . be made out of the testator's net estate for "the maintenance of that dependant . . . ." By sub-s. 7: "The court shall also, on any such application, have regard "to the testator's reasons, so far as ascertainable, for making "the dispositions made by his will, or for not making any "provision or any further provision, as the case may be, for "a dependant, and the court may accept such evidence of "those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, "however, that in estimating the weight, if any, to be attached "to any such statement the court shall have regard to all "the circumstances from which any inference can reasonably "be drawn as to the accuracy or otherwise of the statement."

[His Lordship stated the facts and continued:] The question is whether the Court is entitled to look at the proof to see whether it can ascertain from that what were the testator's reasons for the dispositions which he made in his will. This is objected to on behalf of the plaintiff, in the first place on the ground that the document is not legal evidence. There is no doubt that this objection is well founded for it is not admissible in evidence either at common law or under the Evidence Act, 1938. The question really turns upon what is meant by the word "evidence" in sub-s. 7 of s. 1 of the Inheritance (Family Provision) Act, 1938. Does that word mean legal evidence only or does it mean any material such as persons outside a court of law are accustomed to take into consideration in deciding how to act, such material, for example, as historians rely on?

In my judgment the word "evidence" in that context is not confined to legal evidence; if it were confined to evidence which is otherwise admissible in a court of law there would have been no necessity for having the sub-section in the Act at all. Therefore, I propose to admit the document. It may be that little or no weight should be attached to it but, for the reasons which I have stated, it is material at which the Court is entitled to look to ascertain if it can what the testator's reasons were for making the dispositions in his will.

The evidence was considered by the Court.

*C. A. M. Blake* for the plaintiff. Prima facie the wife is entitled to be maintained. The question is whether the provision made is reasonable. Where none at all has been made it cannot be said that the provision is reasonable. The Court must consider the conduct of the wife in relation to the testator (s. 1, sub-s. 6), but the defendant has failed to prove that she has been guilty of misbehaviour in relation to the marriage. Though the estate is very small the testator was bound to make such provision as he could for her.

*P. B. Morle* for the defendant. The Act was never meant to apply to an estate of this kind. Its object is to secure to dependants not legacies but maintenance. If the estate is so small that it cannot provide maintenance the Act does not apply. Before a case can arise under the Act the Court must be satisfied that reasonable provision for maintenance could be provided out of it. It is a question of fact and degree in each case whether maintenance could be so provided. In this case it could not.

Apart from those considerations the question arises whether it would have been reasonable to make a provision for the widow. She is entitled to a widow's pension and will be entitled to the old age pension. She may also have a right to public assistance and her sons might be called on to contribute to her support. Having regard to her present and future sources of income, as directed by sub-s. 6, the Court would not be justified in depleting so small an estate. He referred to *Bosch* v. *Perpetual Trustee Co., Ld.* (1)

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(1) [1938] A. C. 463.

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*C. A. M. Blake* in reply. Any maintenance, however small, is better than no maintenance at all.

BENNETT J. [having stated the facts :] First, I will read sub-s. 1 of s. 1, omitting immaterial words : " Where, after "the commencement of this Act, a person dies domiciled in "England leaving (*a*) a wife . . . . and leaving a will, then, if "the court on application by or on behalf of any such wife ". . . . (in this Act referred to as a 'dependant' of the "testator) is of opinion that the will does not make reasonable "provision for the maintenance of that dependant, the court "may order that such reasonable provision as the court "thinks fit shall, subject to such conditions or restrictions, "if any, as the court may impose, be made out of the testator's "net estate for the maintenance of that dependant . . . ." From that sub-section it appears, I think, that the intention of the Act was that it was maintenance that was to be provided for a wife, who was a dependant, out of the net estate of a testator, her husband, who by his will had not made reasonable provision for her maintenance.

By sub-s. 2 : " The provision for maintenance to be made "by an order shall, subject to the provisions of subsection 4 "of this section, be by way of periodical payments of income, "and the order shall provide for their termination not later "than—(*a*) in the case of a wife . . . . her . . . . re-marriage; ". . . . or, in any case . . . . her earlier death."

By sub-s. 3 : "The amount of the annual income which may "be made applicable for the maintenance of a testator's "dependants by an order or orders to be in force at any one "time shall in no case be such as to render them entitled "under the testator's will as varied by the order or orders "to more than the following fraction of the annual income "of his net estate, that is to say :—(*a*) if the testator leaves "both a wife . . . . and one or more other dependants, two-"thirds ; or (*b*) if the testator does not leave a wife . . . . or "leaves a wife . . . . and no other dependant, one-half."

By sub-s. 4 : " Where the value of a testator's net estate "does not exceed two thousand pounds, the court shall have "power to make an order providing for maintenance, in "whole or in part, by way of a payment of capital, so however "that the court, in determining the amount of the provision, "shall give effect to the principle of the last preceding "sub-section." That is to say, out of the amount in the present case where the only dependant is the wife the capital out of which maintenance may be provided is limited to one-half of the estate.

By sub-s. 6: "The court shall, on any application made "under this Act, have regard to any past, present or future "capital or income from any source of the dependant of the "testator to whom the application relates, to the conduct of "that dependant in relation to the testator and otherwise, "and to any other matter or thing which in the circum-"stances of the case the court may consider relevant or "material in relation to that dependant, to the beneficiaries "under the will, or otherwise." Now, the only source of income which the plaintiff has at present is a widow's pension of ten shillings a week; she is fifty-eight years of age and in two years time, I understand, she will become entitled, in place of that, to an old age pension of ten shillings a week; that is her only source of income, but she has, I suppose, a right to public assistance in case of necessity, and I understand that in these circumstances her two sons might be called upon to contribute towards their mother's maintenance.

By sub-s. 7: "The court shall also, on any such application, "have regard to the testator's reasons, so far as ascertainable, "for making the dispositions made by his will, or for not "making any provision or any further provision, as the case "may be, for the dependant, and the court may accept such "evidence on those reasons as it considers sufficient, including "any statement in writing signed by the testator and dated, "so, however, that in estimating the weight, if any, to be "attached to any such statement the court shall have regard "to all the circumstances from which any inference can "reasonably be drawn as to the accuracy or otherwise of the "statement."

I am going to decide this case on this ground only: that

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the Act was passed for the purpose of providing out of the net estate of a testator reasonable provision for the maintenance of a dependant. The amount available in the circumstances of such a case as this, where a testator leaves a wife and no other dependant, is either one-half of the income or where, as in this case, the testator's net estate does not exceed 2000*l.*, one-half of the capital. The Act was not passed for the purpose of providing legacies out of a testator's estate. The net estate of this testator is 138*l.* 14*s.* 10*d.* Provision has to be made for the costs of this application. The defendant has a right to costs as an executor unless he has been guilty of some conduct which disentitles him to be paid his costs. No such conduct is alleged. If the costs of the defendant and of the plaintiff of these proceedings were paid out of the estate of this testator I doubt if there would be any of it left, certainly not enough to provide maintenance for the plaintiff. For this reason, in my judgment, this application is one which ought not to have been made and I propose to dismiss it with costs.

Solicitors: *Wilkinson, Howlett & Moorhouse; Boyce, Evans & Sheppard.*

F. C.

## *In re* LIDINGTON.

## LIDINGTON *v.* THOMAS (No. 2).

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*July* 5, 16, 24, 30.

*Will—Wife disinherited—Infant children—Separation deed—Maintenance—Death of husband—End of maintenance—Widow's application for maintenance out of estate—Inheritance* (*Family Provision*) *Act*, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-ss.* 1, 3, 4, 7; *s.* 4.

By s. 1, sub-s. 1, of the Inheritance (Family Provision) Act, 1938: "Where, after the commencement of this Act, a person "dies domiciled in England leaving—(*a*) a wife or husband; "(*b*) a daughter who has not been married, or who is, . . . . "incapable of maintaining herself; (*c*) an infant son; or (*d*) a "son who is, . . . . incapable of maintaining himself; and "leaving a will, then, if the court on application by or on behalf "of any such wife, husband, daughter or son as aforesaid (in this "Act referred to as a 'dependant' of the testator) is of opinion "that the will does not make reasonable provision for the "maintenance of that dependant, the court may order that such "reasonable provision as the court thinks fit shall, subject to "such conditions or restrictions, if any, as the court may impose, "be made out of the testator's net estate for the maintenance of "that dependant:"

"Provided that no application shall be made to the court by "or on behalf of any person in any case where the testator has "bequeathed not less than two-thirds of the income of the net "estate to a surviving spouse and the only other dependant or "dependants, if any, is or are a child or children of the surviving "spouse."

By sub-s. 3: "The amount of the annual income which may "be made applicable for the maintenance of a testator's dependants "by an order or orders to be in force at any one time shall in no "case be such as to render them entitled under the testator's will "as varied by the order or orders to more than the following "fraction of the annual income of his net estate, that is to say:—"(*a*) if the testator leaves both a wife or husband and one or more "other dependants, two-thirds; or (*b*) if the testator does not "leave a wife or husband, or leaves a wife or husband and no "other dependant, one-half."

By sub-s. 4: "Where the value of a testator's net estate does "not exceed two thousand pounds, the court shall have power "to make an order providing for maintenance, in whole or in part, "by way of a payment of capital, so however that the court, in "determining the amount of the provision, shall give effect to the "principle of the last preceding subsection."

By his will dated June 30, 1936, a testator gave his estate, in effect, as follows: One-quarter to K. for life and the remainder,

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including, on K.'s death, that quarter, to the testator's two infant sons, at twenty-eight years of age, with an ultimate gift over should they both die under that age. The will stated that he left "nothing whatsoever" to his wife.

By a separation deed dated June 1, 1937, the testator agreed (inter alia) to pay to his wife during the continuance of the deed 130*l.* a year free of tax for her maintenance. From the date of the separation the wife maintained the two children, the testator making payments also towards that maintenance. The testator died on November 6, 1939. The net value of the estate was about 3600*l.*, but it was subject to a liability under a lease.

By this summons, taken out on March 11, 1940, and later amended, the widow asked (inter alia) that such reasonable provision as to the court might seem fit be ordered to be made out of the testator's net estate for her maintenance, and asked also for a declaration that (inter alia), on the true construction of the separation deed, the testator's liability for the payments did not cease on his death, but that his estate was liable for them, according to their tenor, during the widow's life:—

*Held*, (1.) that the separation deed was not intended to continue beyond the joint lives of the spouses;

(2.) that, on the true construction of s. 1, sub-s. 3, the court could not benefit "dependants" more than by providing for them out of the income of two-thirds of the estate, and that dependants must not receive, under any order of the court, more than the benefit arising out of two-thirds of the estate, including therein all benefits given under the will to any dependants;

(3.) that the case was one in which the Act was intended to be applied. The court would apply it by directing that the income of two-thirds of the estate be paid to the widow, she undertaking to maintain the two children thereout during infancy. The widow and the testator's executor would have liberty to apply to restore the summons. Should the estate prove to be under 2000*l.*, the court might think fit to alter the provision for the widow. An application by her and the executor to restore would be within s. 4 of the Act (which provided for applications to vary orders), but the court had, in any event, jurisdiction to give liberty to apply.

ADJOURNED SUMMONS.

By his will dated June 30, 1936, Harry Lidington (hereinafter sometimes called "the testator") provided (inter alia) "I leave "to K. . . . . one quarter of my estate . . . . to be invested . . . . "and the income paid to her for life and on her decease the "capital sum to be disposed of with the remainder of my estate "as directed hereafter. The goodwill of my business . . . . "I desire shall be offered to Norman Douglas Seymour . . . .

"The remainder of my estate including the quarter of the "estate before referred to on the demise of K. shall be held "in trust for the benefit of my sons . . . . until they arrive "at the age of twenty eight years and in the event of one "dying before they arrive at that age his share shall go to "the other. In the event of both dying before the age of "twenty eight and before the death of K. then the quarter "above referred to shall go to K. absolutely and the residue "divided equally between any children of my brother Ernest "or my sister Gladys Annie. . . . . I leave nothing whatsoever "to my wife Daisy Lidington."

A separation deed dated June 1, 1937, and made between the settlor and his wife Daisy Lidington, provided (inter alia): ". . . . Whereas unhappy differences have arisen between "them" (namely, the husband and the wife) "by reason "whereof they are unable to live harmoniously together and "they are desirous of separating the one from the other upon "the terms hereinafter expressed. Now this deed witnesseth "as follows: (1.) The parties hereto shall henceforth "live separate and apart one from the other and neither "of them shall during the continuance of this deed "at any time or in any manner directly or indirectly "molest disturb or interfere with the other of them or any "person or persons with whom he or she may be residing for "the time being. (2.) The husband will during the continuance "of this deed pay to the said wife by equal monthly payments "in advance the sum of 130*l.* per annum without any deduction "for income tax or any other deduction whatsoever for her "maintenance and support the first of such payments to be "made when the wife vacates the said premises No. 28 Foscote "Road aforesaid in accordance with clause 9 hereof. Provided "always that if the said wife shall at any time be guilty of "scandalous or unchaste conduct or commit any serious or "persistent breach of any stipulations on her part herein "contained all liability of the said husband under this clause "shall immediately cease and determine. (3.) The husband "agrees that the wife shall have the custody of the two said "children of the marriage the husband to have reasonable "and proper access to the child John Henry Peter at all "times for reasonable periods at reasonable times with a "maximum of one half of each school holiday and for four "days during each alternate Christmas and Bank holidays "which period shall be counted as part of the half period of "such school holiday. The husband is also to have access "to the child Michael Geoffrey Steven for at least one week-end "in every month and for one day in each week and further "for the same access as in the case of John Henry Peter so "soon as Michael Geoffrey Steven shall attend boarding school, "which shall not be before he reaches the age of ten years. "The husband further is to have the full control of the choice "of schools and education for the children but shall not choose "a day school for Michael that is not situate conveniently "near the place where the wife may be living. Provided "always that the husband shall not take either of the said "children out of the country. (4.) The husband agrees to "pay all schooling fees for the said children and further to "pay to the wife the sum of 15*s*. per week for the child John "Henry Peter whilst he is on holiday and residing at the home "to be provided by the wife and also the sum of 15*s*. per week "in advance for the child Michael Geoffrey Steven the payment "of such latter sum to commence from the date when the "wife vacates the said premises No. 28 Foscote Road . . . . "(5.) The husband will during the continuance of this deed "pay all proper fees incurred for medical attention upon the "said children and medicine and other items ordered by the "medical attendant the husband to first approve of such "medical attention except in cases of emergency. The wife "in this connection undertaking to immediately notify the "husband in the case of any such illness and to give all "reasonable and proper access during such illness at reasonable "times to such child or children apart from the access herein-"before provided for. (6.) The wife . . . . undertakes to "provide and maintain for herself and the said children a "home which is not to be at or with any of the wife's "immediate relations such home to be consistent with her "income under this deed. (7.) The wife shall not at any "time during the continuance of this deed contract or purport "to contract any debt as agent for the husband or under "any circumstances so as to expose the said husband to any "liability for such debts. (8.) The wife shall not nor shall "any person or persons on her behalf at any time hereafter "molest or disturb the said husband or by any means either "by taking out or process or by instituting any action or in "any other manner compel the husband to cohabit with the "wife or endeavour to enforce any restitution of conjugal "rights or to compel the husband to allow her any maintenance "further than provided for by the deed."

The testator died on November 6, 1939. The estate was valued for probate at about 3600*l.*, but there was a liability to pay rent under a lease of which four years were outstanding. By this summons, taken out on March 11, 1940, and later amended, his wife Mrs. Daisy Lidington (hereinafter sometimes called " the widow ") asked (inter alia) that such reasonable provision as to the court might seem fit be ordered to be made out of the testator's net estate for her maintenance and asked also for a declaration that (inter alia), on the true construction of the separation deed, the testator's liability for the payments did not cease on his death, but that his estate was liable for them, according to their tenor, during the widow's life.

*G. D. Johnston* for the widow. Rule 6 of Order LIV. is the rule which provides for the making of a representation order under the Act. The present case arises under s. 1, sub-s. 3, of the Act. Any order which the court may make on this application will merely create a testamentary disposition. Thus, it will not fetter the executor or interfere with his duties with regard to creditors.

The widow asks that she may be given two-thirds of the income until the estate is cleared. The estate may prove to be worth more than 3000*l.* It is confidently anticipated that it will not prove to be worth less than 1200*l.*

*W. T. Elverston* for the executor. Any order which the court makes must be subject to the rights of creditors.

*E. M. Winterbotham* for K. If the widow succeeds in

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enforcing her rights under the separation deed the estate will be almost insolvent and there will be nothing to come under the Act. "Dependants" means all the persons described in s. 1, sub-s. 1, of the Act.

The proviso to sub-s. 1 is important. A testator is to be entitled, if he makes provision to the extent of two-thirds of his income, to give to any stranger the other one-third and the reversion on his wife's life interest. The intention is to provide for all these people so long as they have no income other than that obtained from the husband or from the wife. The court will not make an order increasing above two-thirds the amount which all the dependants together will take. That is clear from s. 1, sub-ss. 5 and 6. (1)

If more than two-thirds is given by the will, the most that the court can do under s. 1, sub-s. 1, is to adjust the fraction. It cannot give to the dependant anything which has been disposed of, for so to do will be to give to the dependant more than the fraction. Where the estate is not enough to afford "reasonable provision," the court will not award any small sum: *In re Vrint.* (2)

*A. G. Coulson* for the sons.

*D. W. Markwick* (for *Ian Campbell,* on war service) for the ultimate beneficiaries.

FARWELL J. When this summons originally came before me the only questions were whether in this case the Inheritance (Family Provision) Act, 1938, applied and, if so, whether, in all the circumstances, the widow was entitled to some allowance for maintenance because under the will, she took nothing. At the end of the will the testator expressly stated: "I leave "nothing whatsoever to my wife Daisy Lidington." In these circumstances the widow has taken out this summons asking the court to make some provision for her out of the estate. During the argument the question arose whether a deed of separation which had been entered into between the testator and the widow was still subsisting, or whether it came to an end on the testator's death. That seemed to me a question proper to be decided before I considered the questions on the summons. I apprehend that, if the construction of the deed was decided in favour of the wife, and the testator's obligations under it continued during the wife's life notwithstanding his death, the application under the Inheritance (Family Provision) Act, 1938, would not be made. I thought, therefore, that it would be more convenient first to answer the question of construction and then to deal with the other question if it became necessary. Accordingly, at my direction the summons stood over and was amended in order to raise the question of construction. This was not originally raised because, under the Act, the summons had to be taken out within a short period, and it was thought that the most expeditious way of bringing the matter before the court was to seek relief under the Act, and not to challenge the view that the testator's liability under the deed had terminated. Now the whole matter is before me and I have to determine it.

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(1) Sub-sect. 5: "In determining whether, and in what "way, and as from what date, "provision for maintenance ought "to be made by an order, the court "shall have regard to the nature "of the property representing the "testator's net estate and shall "not order any such provision to "be made as would necessitate a "realization that would be improvident having regard to the "interests of the testator's dependants and of the person who, "apart from the order, would be "entitled to that property."

Sub-sect. 6: "The court shall, "on application made under this "Act, have regard to any past, "present or future capital or "income from any source of the "dependant of the testator to "whom the application relates, "to the conduct of that dependant "in relation to the testator and "otherwise, and to any other "matter or thing which in the "circumstances of the case the "court may consider relevant or "material in relation to that "dependant, to the beneficiaries "under the will, or otherwise."

(2) Ante, p. 920.

The question of construction of the deed is not wholly without difficulty. [His Lordship read the relevant parts of the deed, and continued:] The question which I have to determine is whether on the true construction of the deed it continues to operate as long as the wife is alive, after the husband's death. In construing separation deeds of this nature, it is necessary to consider whether or not the parties intended that there should be permanent provision for the wife during the remainder of her life although her husband might predecease her, and I think that the tendency of the court is in favour of a provision for the wife during her life, although the husband predeceases her. That, however, is only a tendency, and the court will not follow it if the language of the document forbids.

In the present case I have come to the conclusion that, on the whole, this deed was not intended to continue beyond the joint lives of the husband and wife. I think that it was contemplated throughout that the arrangements between them were to obtain during their joint lives, and the reference to "the continuance of the deed" seems to me to point to the construction that neither party contemplated that the deed would continue as a binding obligation upon either if one of them died. Speaking for myself, I should have liked to be able to come to a contrary view, but, in my judgment, the language of the deed indicates with reasonable clearness that neither party considered that any of the arrangements made would continue beyond their joint lives. It is difficult to put a very exact meaning on the phrase "during the continuance of this deed," used, as it is, in some clauses and not in others; but in the terms of the deed itself there are undoubtedly strong indications which point to the provisions ending on the husband's death. For instance, I think it reasonably clear that the provisions as to the children are to be binding only while the husband is alive. I cannot separate the deed into parts so as to hold that the obligation to pay the 130*l.* per annum continues during the life of the wife although the husband is dead. The obligation with regard to the children seems to me to indicate quite clearly that those objects at any rate are to be limited, and, as I think, limited either to such period as the children are necessarily dependent on the wife, and the husband is, or may be, under an obligation to maintain them, or to the period which terminates with the husband's death. On the whole I have come to the conclusion that, in this case, and on the construction of this particular deed, the husband's obligation to make payments to his wife on her own behalf and on behalf of the two children ceased on his death. If this be so the widow is now completely unprovided for, and it may be that she is entitled, under the circumstances, to relief under the Inheritance (Family Provision) Act, 1938.

I may add that, as I have already stated, the summons was amended at my instigation, and it does not seem to me that my having come to a conclusion adverse to the wife on the question of construction ought to prejudice in any way any question as to the additional costs incurred by raising this question, nor, of course, can it prejudice in any way the question whether or not she ought to be given some allowance under the Inheritance (Family Provision) Act, 1938, having regard to the fact that her husband has left her completely unprovided for although during his own lifetime he paid her, under this deed, a sum of 130*l.* a year with certain additional sums for the two children. I must therefore answer in the negative the question in the summons which raises the question of the construction of the deed.

I now have to determine whether or not the widow, who is admittedly unprovided for under the will, is entitled to the assistance of the court under the Inheritance (Family Provision) Act, 1938, which has recently come into operation.

It is not possible to ascertain at present the value of the testator's estate. The net value, as appears from the probate valuation, is 3600*l.* odd, but, under a lease, there is a liability under which, if the rent has to be paid during the remainder of the term (which is some four years) will reduce the net value to something under 2000*l.*, so that I cannot now know with any certainty what the estate will ultimately prove to be worth. I certainly cannot to-day make any order on the assumption that it will be less than 2000*l.* because the parties, if they are fortunate, may escape some of the liability under the lease. The estate might then prove to be more than 2000*l.*

[His Lordship stated the relevant provisions of the will and read s. 1, sub-ss. 1, 2 and 3, of the Act, and continued :] In the present case the testator left him surviving a wife and one or more other "dependants" (that is to say, persons being relations to himself, namely his wife and two infant sons). In my judgment the effect of sub-s. 3 on its true construction, is that the court has no power to benefit "dependants" to a greater extent than by providing for them out of the income of two-thirds of the whole estate. Therefore, the "dependants" must not receive, under any order of the court, more than the benefit arising out of two-thirds of the estate (including therein all benefits given under the will to any dependants) and the rest of the estate is to be free for the testator to dispose of as he pleases. Thus, the court cannot deprive persons who are not "dependants" to any greater extent than is provided by the Act; that is to say, the word "dependant" as there used, means the persons who are defined in the Act, whether provision is made for them or not, and in ascertaining the fraction, the court has to take into account not only that which the testator has given to dependants by his will, but any provision which the court thinks fit to make under the Act.

[His Lordship read sub-ss. 4 and 5, and continued :] The Act provides also that the court shall have regard to the testator's wishes within reason, so far as they are ascertainable from the provisions he has made. I do not think that I need refer to any other section except s. 4. I should have said that s. 2, sub-s. 1, provides : "Except as provided by section four "of this Act, an order under this Act shall not be made save on "an application made within six months from the date on "which representation in regard to the testator's estate for "general purposes is first taken out." This summons was taken out within the limited period. Sect. 4, sub-s. 1, provides : "On an application made at a date after the "expiration of the period specified in section two of this Act, "the court may make such an order as is hereinafter mentioned, "but only as respects property the income of which is at that "date applicable for the maintenance of a dependant of the "testator, that is to say : (*a*) an order for varying a previous "order on the ground that any material fact was not disclosed "to the court when the order was made, or that any substantial "change has taken place in the circumstances of the dependant "or of a person beneficially interested under the will in the

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"property; or (*b*) an order for making provision for the "maintenance of another dependant of the testator." Sub-sect. 2 provides: "An application to the court for an order "under paragraph (*a*) of the preceding sub-section may be "made by or on behalf of a dependant of the testator or by "the trustees of the property or by or on behalf of a person "beneficially interested therein under the will."

In the present case, as I said, I do not think that it is open to me to deal with anything except the income, because at the present time it cannot be ascertained whether the capital value of the testator's estate does or does not exceed 2000*l.*: but I am satisfied that this is a case where some provision should be made for the plaintiff. The testator has left her nothing by his will. During his lifetime he covenanted to pay, and, so far as I know, he did pay, 130*l.* a year plus certain sums for the maintenance and benefit of his children. On the construction which I felt bound to put on the separation deed, that provision for his wife has wholly determined. It may be that the testator, when he came to make his will, thought that the provision which he had made for his wife under the deed would continue during her life and that that was the reason why he left her nothing by his will; or there may have been other reasons; but it seems to me that this is one of the cases in which this Act was intended to be applied. I think that it would be wrong for me to say, having regard to the terms of the will, that this is not a case where some sort of provision should be made for the lady. She has two infant children, both, I understand, living with her, and she is maintaining them and has maintained them since the separation took place. The husband's payments were made towards that maintenance. Under those circumstances I think that it is necessary in this case to accede to the application, and I propose to direct that the income of two-thirds of the estate is to be applied by paying it to the plaintiff, she undertaking thereout to maintain the two children during their infancy. This is not an application by or on behalf of the children, but I am entitled, I think, to impose on the plaintiff an obligation to maintain the children as a condition of giving her any benefit under the Act. That is what I propose to do. I propose also to give her liberty to apply, and I think that I must give it to the trustee also. If the estate proves to be under 2000*l.* it may be that the court will think fit then to make some alteration in the provision which it is now making for the widow. Such an application would certainly be within s. 4 of the Act, but in any event I am satisfied that the court has jurisdiction to give liberty to apply. The court, if and when the matter ever comes before it again, will be able, if satisfied that the situation is sufficiently altered, to regulate matters accordingly. The direction to pay the income to the plaintiff will, of course, be limited to her widowhood, because the Act itself provides for that; and I think that it must be limited also to the period during which both children are under age. I think that an application should be made to the court as soon as the elder comes of age. It may be that under the circumstances which then exist some alteration in the provision which I am now making ought to be made.

Taking the difficult position of a small estate, a widow left completely unprovided for, and two children who can be provided for only under the statutory powers so far as they are applicable, I think that the proper order to make is that which I have indicated. It will provide for the immediate future and will give an opportunity, if circumstances alter, to come back to the court. I should add this, that if it becomes necessary for a further application to be made to the court as to income, I do not, as at present advised, see any necessity for any person being represented before the court other than the plaintiff, the executors, and the two children. The lady who takes the income of one-quarter of the estate not being affected by what I am doing, I do not think she will have any interest in any application as to income which is subsequently made. So far as the income of the one-quarter of the whole estate is concerned, that will go to her. I cannot interfere in any way with that. So far as the rest of the estate is concerned, I am proposing to direct that the income of two-thirds of it should be paid forthwith to the plaintiff until

FARWELL J.

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further order, she undertaking to maintain the two children during their infancy. There will be liberty to apply, and I will order the costs of the summons, including the costs of the amendment, to be taxed as between solicitor and client and paid out of the estate.

Solicitors: *Emanuel & Simmonds; Ernest Bevir & Son, for H. Bevir & Son, Wootton Bassett.*

K. R. A. H.

C. A.

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July 25.

## CLEADON TRUST, LIMITED *v.* DAVIS.

[1938. C. 4280.]

*Vendor and purchaser—Option of purchase of freehold land—Condition requiring vendor to release restrictive covenant—Exercise of option—Town planning resolution—Land to be left unbuilt upon—Refusal of purchaser to complete—Judgment for specific performance—Inquiry into title—Purchaser entitled to licence varying restrictions on building—Town and Country Planning Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 48), *s.* 6, *sub-s.* 1.

In September, 1937, a contract was entered into for the sale of a piece of land at Slough, for the purpose of building flats. The contract also contained an option of purchase over another piece of land, described and coloured pink on the same plan. Both pieces of land were subject to certain building restrictions and clause 5 of the contract provided that it was to be conditional upon the vendors obtaining a licence from the persons entitled to the benefit of the restrictions releasing the covenant so as to enable the purchaser to erect a block or blocks of flats.

In September, 1938, the purchaser exercised his option to purchase the said land coloured pink. A few days later a resolution was passed by the South Bucks Joint Planning Committee, of which the Slough Town Council was a member, that a town planning scheme, under which the land the subject of the contract was to be kept as an open space, should be prepared and adopted. In consequence of this the vendors informed the purchaser that clause 5 of the contract was no longer applicable. The purchaser refused to complete and the vendors obtained judgment against him for specific performance. The order directed an inquiry into the title, and upon this the purchaser made a requisition requiring a release of the restrictive covenant. The vendors replied that they could not obtain this, and that the clause as to release was no longer applicable. The purchaser took out a summons for a declaration that the vendors had not made a good title to the property, and that he was entitled to rescission. Bennett J. dismissed the summons :—

*Held,* (1.) that clause 5 of the contract, requiring the release of the restrictions, was a vital part of the whole contract, and that the purchaser was entitled to insist upon it ; (2.) that the town planning resolution could not affect the purchaser's rights, for no final scheme, under which the land coloured pink must remain unbuilt on, had been approved or adopted, and even if it had been adopted, that would not have been a sufficient answer to the requisition ; (3.) that the purchaser was not entitled to rescind the contract, but, the title being at present defective, the proper order to make was that if the vendors within a limited time obtained a release by deed of the restrictions then the inquiry into title could be carried out with a view to the completion of the purchase.

*Halkett* v. *Dudley* (*Earl*) [1907] 1 Ch. 590 applied in working out the proper form of order.

Decision of Bennett J. reversed.

Appeal from a decision of Bennett J.

The appeal was by the defendant in the action after judgment for specific performance had been given. An inquiry into title was ordered and the defendant, as purchaser, made a requisition upon title requiring the vendors to remove a restriction which prevented the purchaser from building a block of flats upon the land purchased, as he intended to do. Bennett J. dismissed the summons and the purchaser appealed. The facts are stated shortly in the above headnote and fully in the judgment of Scott L.J.

*Charles Harman K.C.* and *D. H. Cohen* for the appellant. Owing to the failure of the plaintiffs to comply with clause 5 of the contract requiring the vendors to obtain a variation of the restrictions, the defendant is no longer bound by the contract and claims that it should be rescinded. No town planning scheme which might affect the removal of these restrictions has been adopted, still less approved by the Minister. All that has happened is that a preliminary step has been taken; the local regional committee has passed a resolution under s. 6, sub-s. 1 (*a*), of the Town and Country Planning Act, 1932, to prepare such a scheme, and in the proposed scheme this piece of land is scheduled to be left unbuilt upon. But the scheme may be varied at different stages, and may never become effective.

It is not disputed that the letter exercising the option created a binding contract for sale. But the plaintiffs have failed to show a good title, and the purchaser is no longer bound to complete. The learned judge held that the effect of the passing of the planning resolution was that clause 5 was no longer applicable to the contract for sale. It is submitted that it is still a vital part of the contract and is not affected by the resolution.

*H. B. Vaisey K.C.* and *A. C. Nesbitt* for the respondents. The contract came into existence on September 20, 1938, on the exercise of the option, and on that day both parties had notice under s. 198 of the Law of Property Act, 1925, of the existence of a town planning scheme. Unfortunately, this point was not argued at the trial of the specific performance action. The defendant admitted that the existence of the scheme rendered his plans for building a block of flats impossible.

[LUXMOORE L.J. But there was no binding scheme in existence. It might be many years before a scheme is finally approved and comes into force.]

We may be able to obtain a release of the restrictions. But the Baylis House estate, for whose benefit the restrictions were imposed has now been acquired by the Slough Borough Council. The town clerk in a letter to the respondents refused to consent to the building of flats on the ground that that would contravene the proposed scheme.

*Charles Harman K.C.* in reply discussed the proper form of order to be made and referred to *Halkett* v. *Dudley* (*Earl*) (1) and Williamson's Vendor and Purchaser, 4th ed., p. 1063. Even after a decree for specific performance it is open to either party to apply for rescission.

SCOTT L.J. This is an appeal from a decision of Bennett J. by the defendant, who was the purchaser under a contract of sale of certain land in the neighbourhood of Slough. It arose on a summons taken out by the purchaser after Bennett J. had made an order for specific performance in an action brought by the plaintiffs, the vendors, in which there was the usual order by the judge for an inquiry as to title. The summons asked for a declaration that the vendors had failed to make a good title in answer to a particular requisition which arose out of a clause in the contract of sale.

There were two contracts with which the parties were concerned, the first being a contract dated September 24, 1937, which was a contract primarily for a plot of land close to the Great Western Railway, in the neighbourhood of Slough, delineated on the plan attached to the contract, and there coloured green. By clause 5 in the contract: " The

(1) [1907] 1 Ch. 590.

"conveyance to the purchaser of the property shall be subject "to all the restrictions covenants and conditions contained "in the conveyance thereof to the vendors dated the 1st day "of March, 1928, so far as the same are subsisting and capable "of taking effect Provided that this contract is conditional "upon the vendors obtaining at their own expense a licence "varying the restrictions of user of the property so as to "enable the purchaser to erect a suitable block or blocks of "flats upon the property in accordance with a plan thereof "to be supplied by the purchaser at his own expense before "the vendors apply for the said licence." The contract for the plot there in question, shown on the plan which was there coloured green, was duly carried out and the conveyance executed, and nothing turns on that except that clause 15 of that contract was to this effect: "The purchaser shall "have an option to purchase all that piece or parcel of land "situate in the urban district of Slough containing by "admeasurement 3.98 acres or thereabouts which is more "particularly delineated on the said plan annexed hereto "and thereon coloured pink at the price of 300*l.* per acre "on the terms and conditions of this agreement so far as "applicable thereto."

On September 20, 1938, the purchaser, by a letter from his solicitors addressed to the vendors, exercised that option. The vendors contended that the clause under which they undertook to obtain a licence varying the restrictions on the property, so as to enable a block of flats to be erected, did not apply at all, and, further, that it had by reason of new circumstances ceased to be applicable. In consequence, a dispute arose and the vendors claimed to have the contract made by the acceptance of the offer contained in the original contract specifically performed, and issued a writ on December 14, 1938.

As I have said, an order was duly made in that action for specific performance on grounds which I will deal with presently. In the meantime, subsequent to December 24, 1937, the date of the original contract, a planning resolution under the Town and Country Planning Act, 1932, had been passed by the South Bucks Regional Planning Committee, by which the land coloured pink on the plan was to be kept permanently as an open space. I will revert to the question how far the resolution had that effect, but the purchaser, having had notice from the vendors of the planning resolution which had been passed locally, objected to carrying out the contract. Hence, the issuing of the writ by the vendors.

The correspondence relating to the question is before us. [His Lordship referred to it, and proceeded :] In a letter of December 11 it appeared that the dominant party entitled to the benefit of the restrictions had sold to the Slough Corporation.

On December 12, the purchaser's solicitors wrote a letter raising the question in relation to the requisitions. That makes it necessary to refer, at this point, to the requisitions. No. 22 stated : " A deed of release in a form approved by "the purchaser's solicitors, granted by the persons for whose "benefit the covenants relating to user of the land were "inserted, waiving these covenants to enable the purchaser "to erect blocks of flats in accordance with the contract "must be handed over on completion." If clause 15 of the original contract was applicable to the new contract made by the letter of September 20, 1938, that was a proper requisition, and unless the vendors could comply with it they could not make a good title for the purpose of the contract. The answer was as follows : " In view of the adoption by "the Slough Borough Council of the scheme under the Town "and Country Planning Act, 1932, as mentioned in the "pleadings in the action of the vendors against the purchaser, "the clause in the contract relating to the modification of "the restriction as to user is not applicable to this purchase. "The purchaser must make his own arrangements with the "borough surveyor to whom we understand proposals have "been submitted by him for the erection of flats. The "borough council are the interim development authority "and they act in consultation with the South Bucks Joint "Planning Committee which is preparing the scheme. The "decision of the council will we are informed be formally "notified in accordance with the provisions of the Town "Planning Acts. The council are also now the owners of the "land on the Baylis Court Estate in whose favour the restrictive "covenants were imposed." Those requisitions were dated December 5, 1939, and the answers were dated December 11, 1939.

On that, the purchaser, after further correspondence, took out a summons asking for a declaration that "owing to the "failure of the plaintiffs to comply with the conditions "mentioned in clause 5 he is no longer bound by the contract."

The question before us is primarily whether, in answer to that summons, the purchaser is entitled to a declaration that, unless the vendors are in a position to make good the term of clause 5 of the original contract incorporated in the contract for the pink land, they are in a position of inability to make the title good.

The first question to decide, before I refer to the further history of the matter, is the construction of the clause in the contract containing the option. In my view, clause 5 by which the vendors give an unqualified undertaking to obtain a licence enabling the purchaser to erect a suitable block of flats on the land, is clearly applicable to the second contract made by the letter of September 20, 1938, on the terms contained in the original contract. The only doubt which could possibly arise is whether that clause is " applicable "to the new contract," the words at the end of the option clause, clause 15, being " the terms and conditions of this "agreement so far as applicable thereto." In my opinion clause 5, relating to restrictions, was a vital clause, not only applicable, but necessarily applicable and of vital importance to the purchaser. I have therefore come to the clear conclusion that the purchaser was right in saying that it was the duty of the vendors, in order to make a good title pursuant to the contract, to procure the licence in accordance with clause 5 of the original written contract.

That does not quite dispose of the matter. Mr. Harman, for the purchaser, contended that, in the circumstances, although the matter of making good a title was, so to speak, in the hands of the Court, yet the unwillingness of the vendors to procure a licence, and, indeed, their actual refusal to do so, as expressed in the letter which I have already read, and repeated in subsequent letters, amounted to a repudiation of their contract which entitled the purchaser to a final order under his summons, releasing him from further obligation to carry out the order of the Court made in the specific performance action.

That raises the grounds, to a certain extent, which were taken by the defence before Bennett J. when he made the order in question. There is no transcript of his judgment, but we have been furnished with a note made by the two juniors concerned on each side, which enables us to appreciate what his reasons were. The learned judge said: "There "was lengthy correspondence down to January, 1940, in "which the plaintiffs insisted that clause 5 was in the "circumstances not applicable to the contract now in question," and he expressed his opinion that that point was a good one. He added: "It is manifest that not all the provisions affecting "the green land"—that is the land under the first contract—"would or might apply to the pink land. They were only to "be applied 'so far as applicable thereto.' On his own "evidence, before he exercised his option the scheme had "come into force, and the land could not be built upon." "What is the use"—the learned judge said—"of the "provisions of clause 5 when he knows the land cannot be "built upon. It would be perfectly idle to call upon the "plaintiffs to obtain the licence in those circumstances, and "clause 5 has become inapplicable." The learned judge therefore refused the declaration asked for by the summons.

In my view, as I have already said, the clause was quite clearly applicable, and I cannot agree with the learned judge's view upon that issue.

With regard to the learned judge's further point that the applicability of the clause had ceased by reason of new circumstances—namely, the passing of a town and country planning scheme under the Act, even if the scheme itself had been, as the learned judge supposed in his judgment, actually passed so as to become binding in law, in my opinion that would not have been a sufficient answer to the requisition, because the purchaser was entitled as of right to have his land freed from the restriction of the covenant. Whether thereafter he would find some means of getting leave from the responsible authority to build is impossible to conjecture. By " responsible authority," I mean the responsible authority within the meaning of the Town and Country Planning Act, 1932—the authority who has the responsibility for carrying out a scheme when it has been approved by the Minister and submitted to Parliament, and, thereupon, converted into law, and also in the interim period with regard to proceedings before the date when the scheme is finally passed. In fact, in this case, the learned judge was in error in saying that the scheme had been passed. All that had happened was that a resolution had been passed by the South Bucks Joint Planning Committee, of which the town council of Slough was a member. I gather—this is merely a matter of inference—that the joint committee had been concerned in the framing of the scheme, and had perhaps been concerned subsequently as an advisory committee. But the responsible authorities for carrying out the scheme, and for interim proceedings, were evidently not the joint committee but the constituent local authorities. In my opinion, there was no ground at all for saying that anything had happened to make it impossible by any compulsion of law for the vendors to carry out their contract. I arrive at the final conclusion that the learned judge's judgment was wrong on that matter.

The question what order we should make in view of those circumstances is a different question. Mr. Harman has contended that we should make an order which, in effect, would end the matter and operate as a rescission of the order for specific performance. I am not satisfied that that would be right. At first, Mr. Harman did contend that the action of the vendors in refusing definitely, as they did in the letter which I have read, and I think they repeated it subsequently, amounted to a repudiation of all obligations under the contract, even after the order for its specific performance; and that, secondly, it was open to the purchaser to accept that repudiation and thereupon to rescind the contract. In my view that contention is wrong, and I think that, in the end, Mr. Harman was not prepared to maintain that submission. But that does not end the matter with which we have to deal. He submitted that he should have a final declaration of the failure by the vendors to make good that requisition. Again I think that that is putting his rights too high.

He referred us to *Halkett* v. *Dudley* (*Earl*) (1), a case which came before Parker J., and particularly to a passage at page 601. The headnote in that case is as follows: "A "purchaser's right to repudiate the contract is an equitable "right arising from want of mutuality, and may be a defence "to an action for specific performance; but in order to avail "himself of that defence he must repudiate the contract as "soon as he finds that the vendor cannot make a good title. "After a decree for specific performance has been made the "purchaser cannot repudiate the contract without the leave "of the Court." Parker J. said (2): "The proper course for "the purchaser, on discovery of a defect of title such as might, "but for the decree, give rise to a right of repudiation, is to "move to be discharged from the contract. Even if he does "so move I do not think he would be entitled to be discharged "as a matter of course. A decree for specific performance "enures for the benefit of both parties, and on the reference "as to title a vendor is not confined to shewing such title "as he had at the date of the decree, much less to such title "as he had at the date of the contract, but may perfect his "title at any time before certificate. On the other hand, "the purchaser is not confined to objections taken by him "before or at the hearing." Then he said (3): "Then "there was also the case of *Coffin* v. *Cooper* (4), the headnote "of which is this: 'Purchaser cannot insist on being "'discharged upon a report of defective title, if capable "'of being made good within a reasonable time; as to which "'the vendor will be put under terms.'"

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(1) [1907] 1 Ch. 590.
(2) Ibid. 601.
(3) Ibid. 602.
(4) (1807) 14 Ves. 205.

Applying those principles here, I think that the proper order for the Court to make is that the answer to the requisition is not sufficient, but that if within a limited time a licence in accordance with the clause of the agreement as contained in the original agreement of September 24, 1937, is obtained by the vendors in accordance with its terms, then the inquiry as to title can be carried out, the effect of a satisfactory answer on that requisition not in any way prejudicing the purchaser's rights with regard to all the other requisitions.

CLAUSON L.J. I agree with my Lord that the appeal must succeed. As we are differing from the judgment of Bennett J. I should like to express in a few words where I find myself unable to agree with him. First, the agreement which we have to construe is the agreement of September 24, 1937. That is not the contract of which specific performance has been ordered: specific performance has been ordered of the contract arising from the exercise of an option granted by the agreement of September 24, 1937.

Turning to the agreement of September 24, 1937, I confess that it seems to me most difficult to understand how it can be suggested that the provision in clause 5, relating to conveyance free from restrictions, can be otherwise than applicable to the agreement which it is contemplated will come into operation when the option is exercised with regard to the further piece of land which is subject to the same restrictions. It seems to me to be perfectly clear, on the construction of that agreement, that the agreement arising from the exercise of the option must be taken to have comprised in it the provisions of clause 5 of the original agreement. The learned judge seems to have taken the view that, before the option was exercised, it had become impossible to build flats on this particular piece of land by reason of the provisions of the Town and Country Planning Act. There must have been some misunderstanding in the course of the argument in the Court below, because, when one goes into the matter, it is perfectly clear that that is not the position at all. The position now is that there is a possibility that it will become unlawful to build flats on this piece of land, and, having regard to the fact that the procedure under the Town and Country Planning Act has been started, anybody who builds flats on this piece of land will take the risk of having to pull them down without compensation if the proposed town planning scheme ultimately becomes a binding scheme. But that is quite a different position from that which was envisaged, as I understand it, in the judgment of the learned judge.

However that may be, the point which seems to me to be of real importance is this, that the purchaser is entitled to object to taking the land except with a release of these restrictions. The learned judge seems to have thought that the release of these restrictions would not do the purchaser any good. I cannot take that view at all, having regard to the position with regard to town planning. I should have thought that it was quite obvious that a man who seeks to obtain an alteration in a town planning scheme in order that he may build flats on his land is in a much stronger position for opposing the final sanction of the Ministry being given to a scheme which would prevent the building of flats if, as against his neighbours, he is entitled to build flats on his land, than a man who remains bound to some of his neighbours not to build flats on the land. It seems to me to be of vital importance to the purchaser that he should have the advantage of clause 5, and should have the right to call on his vendor to convey to him the land with a contemporaneous release of the restrictions.

Accordingly, I find myself, I regret to say, in complete disagreement on both points, and it appears to me that it is clearly the duty of the vendors in this case by the proper time to clear up this matter of title by obtaining the release. Since the vendors think it worth while to have another try to obtain the release it is clear to me, for the reasons which my Lord has given, that we cannot deal with the matter peremptorily now and say that the vendors must be taken to have lost all opportunity of putting the matter right.

The right course, in my view, is that we should declare that the purchaser is entitled to call on the vendors to obtain such a release, and, if the vendors do not obtain such a release within due time, in the ordinary course of the proceedings in the action, the result will be that the defendant will get rescission. Of course, that is not a matter with which we shall deal in our order.

LUXMOORE L.J. I agree that the appeal must be allowed. The contract material to be considered arises out of the exercise of an option conferred on the appellant under clause 15 of an agreement for sale of land at Slough, dated September 24, 1937. The land which was the original subject-matter of the contract is shown on the plan to the contract, and is coloured green. The land which is the subject of the option is coloured pink. It is common ground that the pink and green land were held under the same title. The green land was on the north of a road called Woodland Avenue and the pink land was on the south, and both parcels of land contained a total acreage of more than five acres, the pink land being nearly four acres.

It appears from the contract of September 24, 1937, that the purchaser's (that is, the appellant's) object in buying the land was to erect flats on it. The vendors' title was subject, as appears from the contract, to a number of restrictions which prevented the free user of the land, and, among others, are the restrictions referred to in clause 5 of the covenant, which prevents, among other things, the erection of flats on the land. That clause provides that the vendors are to obtain a licence varying those restrictions so as to enable the purchaser to erect flats on the land.

The first question which arises with regard to the exercise by the purchaser of the option given to him by clause 15 with regard to the pink land is: What are the terms and conditions of the agreement which are to be applicable to the purchase resulting from the exercise of the option? It seems to me quite plain that matters which deal with the title to the land, which is the same in each case, must be matters applicable to both parts of the land. It was argued

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before Bennett J., and I think he accepted the argument, that the provision relating to the licence varying the restrictions so as to enable blocks of flats to be erected on the pink land was not applicable to the contract resulting from the exercise of the option to purchase the pink land, because the local authority, in conjunction with some other authority, or authorities, had adopted a town planning scheme under the Town and Country Planning Act, 1932, which, according to its present proposals, reserves the pink land as land on which no buildings are to be erected. Bennett J. said that, in those circumstances, it was useless to get the restrictions removed, and the ground on which he based that view appears to be that the town planning scheme was an effective scheme, and was then in full operation.

I think that there can be no doubt that the learned judge was in error when he took that view, because the town planning scheme is not at the present time effective as a scheme which can be enforced in all its details. Indeed, as I understand it, it has not been submitted to the Minister for approval, and no inquiry has yet been held with regard to it. It may well be that, when the inquiry is held, the appellant, if he completes the purchase of the land in question, may be able to persuade the Minister to vary the scheme by allowing flats to be built on the pink land. If he urges that proposition before the Minister, he certainly will not be in a worse position, if he has asked for a proper release of the pink land from those restrictions which prevent flats from being built. To my mind, the existence of the restrictions and their release has no relationship to the existence of a town planning scheme, whether in its early stages or even after the scheme has been approved by the Minister and has become law, for it is always open to a landowner whose land is affected by a town planning scheme to apply to the Minister for its variation, and I see no reason for excluding the applicability of clause 5 of the contract to purchase the pink land owing to the existence of the town planning scheme.

No doubt, if the appellant completed the purchase of the pink land, and was minded to build flats on it, he could do so without any fear at the moment of the local authority taking any step to prevent their erection, because until the town planning scheme becomes effective the only sanction against building in contravention of such a scheme is the power conferred on the local authority, if so minded, to order him to pull down the flats after the scheme has become effective. This may be a risk which the appellant is ready and willing to take, but if he were to attempt to build flats on the pink land without obtaining the release of the relevant restrictions, the local authority, who, I understand, are now the owners of the land, which has the benefit of those restrictions, could at once obtain an injunction restraining the appellant from building flats on the pink land. This would be contrary to the terms of the agreement.

It is for these reasons that I find myself quite unable to agree with the decision of Bennett J.

With regard to the argument that the appellant is entitled to have the contract rescinded, I do not think that it is necessary to add anything, except to say that the answer to that is to be found in the judgment of Parker J. in *Halkett* v. *Dudley* (*Earl*) (1), to which my Lord has already referred.

I think that there should be a declaration that the answer to requisition 22 is insufficient, and that Cleadon Trust, Ld., cannot make a good title to the property in question unless and until the restrictions referred to in clause 5 of the contract of September 24, 1937, have been released to the extent mentioned in that clause, and that this declaration is without prejudice to any other question arising with regard to the title on the inquiry as to title directed by the order of October 18, 1939.

I agree that the appeal must be allowed.

The appeal was accordingly allowed, with costs.

Solicitors: *Clutton, Moore & Lavington, for F. Miller Parris, Croydon; T. D. Jones & Co., for Criddle, Ord & Muckle, Newcastle-on-Tyne.*

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(1) [1907] 1 Ch. 590.

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stinguished. *In* KEELE ESTATES o. 2) [1952] 1 Ch. 603

## *In re* SMITH-BOSANQUET (DECEASED).
## SMITH *v.* SMITH-BOSANQUET.

[1940. S. 590.]

*Settlement—Estate duty—Incidence—Power to appoint annuity to widow—Exercise of power—Annuity of* 2000*l. free of all deductions except income tax and sur-tax—Whether liable to proportion of estate duty—Appointment within terms of power—" Provision to the contrary "—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

Under a settlement of real and personal estate made by will in 1905, there was a power given to the tenant for life to appoint for the benefit of his widow any part of the income of the residuary trust estate not exceeding 2000*l.* a year for the rest of her life.

The tenant for life by his will made in 1934, appointed in exercise of this power to his wife who survived him, an annuity of 2000*l.* free of all deductions except income tax and sur-tax, to be charged on and payable out of the income of the residuary personal estate of the settlor. On the death of the tenant for life in 1939 estate duty upon the residuary estate became payable at the rate of 32 per cent. :—

*Held*, that the appointment was within the terms of the power, and that the widow was entitled to an annuity of 2000*l.* clear, without any liability under s. 14, sub-s. 1, of the Finance Act, 1894, to contribute to the estate duty payable on the death of her husband, the direction that it should be paid " free of all " deductions " being an express provision to the contrary within that sub-section.

SUMMONS.

The testator, H. J. Smith-Bosanquet, by his will dated June 30, 1905, after appointing executors and trustees devised all his freehold lands and hereditaments to the use of his trustees during the life of his son George Richard Bosanquet Smith-Bosanquet without impeachment of waste upon certain trusts during his life, and after his death to the use of the first and other sons of G. R. B. Smith-Bosanquet severally and successively in tail general with remainders over. The testator bequeathed all his residuary personal estate upon trusts for sale and investment, and to stand possessed of the investments directed to be made or retained upon the like trusts and subject to the same powers and provisions as if the same were capital money arising under the Settled Land Act, 1925, from his residuary real estate. By clause 26 of his will the testator declared that the said G. R. B. Smith-Bosanquet might from time to time or at any time by deed or will or codicil appoint to or for the benefit of any widow whom he might leave surviving him during the residue of her life or any less period and subject to such conditions and such discretion exercisable by his trustees any part or parts of the income of his residuary trust fund not exceeding in the whole the annual sum of 2000*l.* The testator died on March 28, 1907, and his will was duly proved by his executors on April 30, 1907. The tenant for life G. R. B. Smith-Bosanquet was twice married first to Elizabeth Woodcock who predeceased him without having had issue, and secondly to the defendant Ethelind Minnie Smith-Bosanquet. There was one child of this marriage, the defendant George Andrew Smith-Bosanquet, the tenant in tail under the settlement, born October 3, 1934. By his will dated August 24, 1934, the late tenant for life G. R. B. Smith-Bosanquet, in exercise of the power contained in the testator's will appointed to his wife Mrs. Ethelind Minnie Smith-Bosanquet if she should survive him during the residue of her life, the yearly sum of 2000*l.* free of all deductions (except income tax and sur-tax) to be charged upon and payable out of the residuary personal estate bequeathed by the testator's will and the investments and property representing the same. The said G. R. B. Smith-Bosanquet died on January 29, 1939, and his will (together with a codicil not material to the question raised by the summons) was proved by his executors on April 19, 1939.

The value of the residuary trust fund at the date of the death of G. R. B. Smith-Bosanquet was approximately 283,252*l.* and the estimated gross yearly income therefrom was 10,000*l.* The rate of estate duty payable on such death was 32 per cent., so that if the defendant Mrs. Ethelind Smith-Bosanquet was liable to contribute to the duty payable in respect of her annuity, the amount of her contribution would be 620*l.* 16*s.* 10*d.* per annum, which would reduce the annuity to the annual sum of 1379*l.* 3*s.* 2*d.*

The question raised was whether on the true construction of the testator's will the defendant Mrs. Ethelind Minnie Smith-Bosanquet was entitled under the appointment made by the late tenant for life to a clear annuity of 2000*l.* payable out of and charged upon the income of the residuary personal estate, or whether she was entitled to the annuity after payment thereout of a proper proportion of the estate duty payable on the death of G. R. B. Smith-Bosanquet.

*Lindsay Jopling* for the plaintiffs, the present trustees of the will.

*H. B. Vaisey K.C.* and *F. C. Watmough* for the widow, Mrs. E. M. Smith-Bosanquet. The power to pay the annuity out of the income of the residuary estate, means out of such income after the estate duty has been paid. The income of the residuary estate is reduced by various charges, but the Act does not provide for a second recoupment on a second death: see *In re Drake* (1); Dymond on Death Duties, p. 232; *In re Coxwell's Trusts.* (2) The annuity is not a jointure, but an apportioned part of a much larger total income. The income of the residuary estate can only be ascertained after the estate duty payable on the death has been paid. The annual sum of 2000*l.* means the net sum of 2000*l.*, after deduction of income tax and sur-tax thereon, but free of all other deductions. The appointment was within the terms of the power.

[Counsel were stopped by the Court.]

*W. P. Spens K.C.* and *Leonard Stone* for the infant defendant, tenant in tail. The appointment is an excessive execution of the power. The widow will get under it not 2000*l.* only, clear of all deduction, but 2000*l.* plus her share of the estate duty which she would otherwise have had to pay. It is equivalent to an annuity of 2620*l.* The words "without "any deduction" amount to an additional grant, not justified by the power. Unless the power authorizes the appointment of an annuity free of all deductions, which it does not in the present case, the appointment is not within

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(1) [1926] Ch. 559.

(2) [1910] 1 Ch. 63.

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the terms of the power: see *In re Chisholm* (1); *In re Saunders* (2); *In re Parker-Jervis* (3); *In re Egmont's Settled Estates* (4); *In re Viscount Portman* (*No.* 2). (5)

The case comes within the rule laid down in *In re Parker-Jervis.* (3) The widow should be treated as tenant for life of the capitalized value of her annuity, and pay during her life interest on the estate duty to which that value is liable.

The suggestion that the annuity is charged solely on the income of the trust fund amounts to an argument that it does not matter whether the words "clear of all deductions" are in the appointment or not. The decision in *In re Drake* (6) is no authority here, except as to the freedom from liability to contribute of an assignee for value of part of a trust fund: see per Pollock M.R. (7)

BENNETT J. I think that the question raised by the summons depends on the terms of a power contained in the will of the late Mr. Horace James Smith-Bosanquet, who died on March 28, 1907. By clause 22 of his will he bequeathed all his personal estate not thereby or by any codicil otherwise specifically disposed of to his trustees on the usual administrative trusts, and by clause 25 he declared that his trustees should stand possessed of the investments therein before directed to be made or authorized to be retained (thereinafter called his residuary trust fund), and the annual income thereof, on the like trusts and with and subject to the like powers and provisions in all respects as if the same were capital money or investments of capital money arising under the Settled Land Acts, 1882 to 1890, from his residuary real estate thereby settled. His real estate was settled to uses by which his son, the late George Richard Bosanquet Smith-Bosanquet, was tenant for life without impeachment of waste, and from and after his death to the use of his first and other sons severally and successively according to seniority in tail general. By clause 26 of his will the testator provided as follows: "I

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(1) [1902] 1 Ch. 457.
(2) [1898] 1 Ch. 17.
(3) [1898] 2 Ch. 643.
(4) [1912] 1 Ch. 251.
(5) [1925] Ch. 294.
(6) [1926] Ch. 559.
(7) Ibid. 565.

"declare that my said son"—George Richard Bosanquet Smith-Bosanquet—"may from time to time or at any time "by deed revocable or irrevocable or by will or codicil appoint "to or for the benefit of any widow he may leave him surviving "during the residue of her life or any less period and subject "to such conditions and such discretions exercisable by my "trustees or by any other person or persons any part or parts "of the income of my residuary trust fund not exceeding in "the whole the annual sum of 2000*l.* such annual sum to be "payable at such times and in such manner as my said son "shall think fit."

The testator's said son, Mr. G. R. Smith-Bosanquet, made his will on August 24, 1934. He had one son, the infant defendant, George Andrew Smith-Bosanquet, and he left a widow, the first defendant. By his will, in exercise of the power conferred on him by the will of the testator, Mr. G. R. Smith-Bosanquet appointed to his widow, if she should survive him, during the residue of her life the yearly sum of 2000*l.* free of all deductions except income tax and sur-tax to be charged on and payable out of the income of the residuary personal estate.

The question which is asked by the summons is: Whether on the true construction of the will the widow is, under the appointment made in her favour, entitled to a clear annuity of 2000*l.* payable out of and charged on the income of the said residuary personal estate, or whether she is entitled to such annuity after payment thereout of a proper proportion of the estate duty payable in respect of the said residuary personal estate on the death of the said G. R. Bosanquet Smith-Bosanquet. The residuary trust fund on the income of which the annuity was charged was at the date of Mr. G. R. Bosanquet Smith-Bosanquet's death worth approximately 280,000*l.* odd, and the estate duty was at the rate of 32 per cent. But for the terms of the appointment the widow would be chargeable with a rateable proportion of estate duty under the provisions of s. 14, sub-s. 1, of the Finance Act, which provides as follows: "In the case of property which does not "pass to the executor as such, an amount equal to the proper "rateable part of the estate duty may be recovered by the "person, who being authorized or required to pay the estate "duty in respect of any property has paid such duty, from "the person entitled to any sum charged on such property "(whether as capital or as an annuity or otherwise) under a "disposition not containing any express provision to the "contrary."

The case of the infant defendant is put in this way. The appointment made in favour of the widow is an appointment of the yearly sum of 2000*l.* free of all deductions except income tax and sur-tax. The words "free of all deductions" are words which amount to an express provision to the contrary, within the meaning of s. 14, sub-s. 1, of the Finance Act, 1894, and so exonerate the appointee from the liability for the rateable proportion of the estate duty for which she would be liable under the provisions of sub-s. 1 of s. 14 if the words had not been in the appointment. The argument is that, because the appointee is exonerated from estate duty, therefore the appointor, the donee of the power, has made an appointment which is in excess of the authority conferred on him by the terms of the power. The argument is that, unless in the power there are words expressly enabling the donee of it to make an appointment free of all deductions, appointment so made is not warranted by the terms of the power.

I do not accept the argument. It seems to me that, so long as the appointment made in exercise of the power does not charge the income of the residuary trust fund with a greater annual sum than 2000*l.*, the appointment is within the terms of the power. The appointment which the donee of the power has made does not have the effect of charging the annual income of the residuary trust fund with a greater sum annually than 2000*l.* The widow out of the income of the residuary trust fund gets no more than 2000*l.* It is true she is absolved from liability which otherwise might be imposed on her of having to pay a proper rateable part of the estate duty leviable, when her husband died, on the residuary trust fund under the testator's will; but an appointment which has that effect does not, in my judgment, exceed the authority which is

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conferred on the donee of the power by the terms of the testator's will.

I think, therefore, the answer to the question raised is that the widow is entitled to a clear annuity of 2000*l.*, and entitled to such annuity without being liable to contribute towards estate duty payable on the death of G. R. Bosanquet Smith-Bosanquet.

Solicitors: *Trower, Still & Keeling; Emmet & Co.*

H. L. L.

# *In re* COURTS (EMERGENCY POWERS) ACT, 1939, AND *In re* S. BROWN AND COMPANY (GENERAL WAREHOUSEMEN), LIMITED.

BENNETT J.
1940
*July* 30.

[1940. S. 2158.]

*Emergency legislation—Company—Debenture-holders—Action to enforce debentures—Appointment of receiver—Voluntary liquidation—Leave of Court to proceed to sell property subject to charge—Receiver agent of debenture-holders—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2.

Receivers of a company were appointed, by leave of the Court, in a debenture-holders' action. The company afterwards passed a resolution for voluntary winding-up. The receivers then applied under the Courts (Emergency Powers) Act, 1939, for leave to sell the property subject to the charge:—

*Held,* that the receivers since the liquidation had ceased to be the agents of the company, and had become the agents of the debenture-holders. The Court granted the receivers leave to sell the property as such agents.

*Gosling* v. *Gaskell* [1897] A. C. 575 applied.

PROCEDURE SUMMONS.

The summons was taken out by Charles Sherrott and William Henry Cork, who had been appointed receivers and managers of the business of S. Brown & Son (General Warehousemen), Ld., upon the application of debenture-holders, Solomon Brown and his wife Sarah Brown. The appointment was made after the debenture-holders had applied for, and obtained, the leave of the Court under the Courts (Emergency Powers) Act, 1939. The company afterwards passed a resolution for voluntary winding-up.

The receivers now desired to sell the property subject to the charge created by the debentures, and the summons was taken out to obtain the leave of the Court to proceed to sell it. The questions raised by the summons were, whether the leave of the Court was necessary, and if so, who were the proper parties to apply for such leave. The summons had

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been amended by adding Mr. and Mrs. Brown, the debenture-holders, as applicants.

*M. L. Gedge* for the applicants. The application raises a point of some importance, namely, whether, when the Court has given to a debenture-holder leave to appoint a receiver under hand, and the company subsequently goes into voluntary liquidation, the receiver can act without the leave of the Court. The facts are that leave to appoint a receiver was given on February 27, 1940, and that the company went into voluntary liquidation after the receivers had been appointed. The effect of that is that the receivers ceased to be the company's agents and became the agents of the debenture-holders who appointed him : *Gosling* v. *Gaskell.* (1) The debenture-holders and the receivers now seek leave to exercise any remedy which is open to them by way of realizing the security comprised in the debentures, and it is submitted that they are entitled to that leave.

BENNETT J. This is a summons under the Courts (Emergency Powers) Act, 1939. It was originally issued by Mr. Charles Sherrott and Mr. William Henry Cork, the joint receivers and managers of the property comprised in debentures issued by the respondents, S. Brown & Son (General Warehousemen), Ld., now in voluntary liquidation. Mr. Cork is the liquidator of the company, and he and Mr. Sherrott are the joint receivers and managers of the property appointed by the two debenture holders, Mr. Solomon Brown and Mrs. Sarah Brown. The summons has since been amended by adding Mr. and Mrs. Brown as applicants. The relief sought is that Mr. Sherrott and Mr. Cork, as joint receivers and managers, should be at liberty to sell the property.

Mr. Sherrott and Mr. Cork, by order of February 27, 1940, were appointed receivers and managers, under the powers contained in the debentures, by Mr. and Mrs. Brown after they had applied to the Court, under the Courts (Emergency Powers) Act, 1939, for leave to exercise any remedy which might be available to them by way of the appointment of a receiver, and had obtained the order giving them leave.

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(1) [1897] A. C. 575.

Clause 11 of the debentures provides: "The holder or "holders of this debenture may at any time after the principal "moneys secured by this debenture shall have become payable "by any writing or writings under his or their hand or hands "appoint a receiver of the undertaking, property and assets "hereby charged (with power for such receiver, in addition "to exercising the powers conferred by the sections of the "Law of Property Act 1925 hereinafter mentioned, to manage "and carry on the business of the company, to take possession "of, get in and collect the property and assets hereby charged, "and to sell, convert into money and realise the same, and "to convey the property sold in the name and on behalf "of the company, for which purpose the company hereby "irrevocably appoints every such receiver its attorney) and "may at any time in like manner remove a receiver so "appointed and appoint another in his place with like powers. "Any receiver so appointed shall so far as the law allows be "deemed to be the agent of the company for all purposes "and the holder or holders of this debenture shall not nor "shall any of them be under any liability for his remuneration "or otherwise. All moneys received by any such receiver "shall, after providing for the matters specified in the first "three paragraphs of section 109 (8.) of the Law of Property "Act 1925, and subject to the provisions of that Act as to "the application of insurance money, be applied in or towards "satisfaction of the principal moneys and interest secured "by this debenture, and subject as aforesaid, be held in trust "for the company. The foregoing provisions shall take "effect by way of variation and extension of sections 101 "and 104 to 109 inclusive of the said Act, and the provisions "of those sections, and the powers conferred on a mortgagee "or receiver by those sections, as so varied and extended, "shall apply to and be exercisable by any such receiver so "far as applicable."

As I understand it, since the order of February 27, 1940, was made giving leave to exercise the remedy of appointing a receiver, and since Mr. Sherrott and Mr. Cork were appointed, the company has gone into voluntary liquidation. The result of that is, according to *Gosling* v. *Gaskell* (1), to put an end to the agency of the receivers quoad the company, and the question now arises whether the receivers, when they want to sell, should obtain the leave of the Court under the Courts (Emergency Powers) Act, 1939.

The answer to that question depends on the meaning of s. 1, sub-s. 2, of the Act, having regard to the facts of the case. The section provides that, subject to the provisions of the section, a person shall not be entitled, except with the leave of the Court, to exercise any remedy available by way of (inter alia) the appointment of a receiver or the realization of any security.

In the present case, if the company had not gone into liquidation and the receivers were still the agents of the company, it might be difficult to say that the receivers, seeking to exercise the powers given by clause 11 of the debentures as the company's agents, were proceeding to exercise any remedy available to them. But the position is quite different where, as in the present case, the receivers, as the result of liquidation, have ceased to be agents of the company, and are acting in co-operation with the debenture-holders who appointed them. If, in those circumstances, the receivers desire to realize the property, they must then, in realizing it, be acting as the agents of the debenture-holders, and their act, in realizing it, is not their act, but that of the debenture-holders whose agents they become. In those circumstances it is necessary for the leave of the Court to be obtained at the instance of the debenture-holders whose agents the receivers must be assumed to be. That is my view of the meaning of the Courts (Emergency Powers) Act, 1939, on the facts of the present case. There is no difficulty in making the order, and I give the applicants authority to sell the property comprised in the debentures.

I express no view with regard to what the position is where a receiver who has been appointed under hand, has had conferred on him powers to sell, and has been made the agent of the debenture-holders, and the agency has not been determined by voluntary liquidation (as in the present case) or otherwise.

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(1) [1897] A. C. 575.

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COURTS (EMERGENCY POWERS) ACT, 1939, AND S. BROWN & CO. (GENERAL WAREHOUSEMEN), LD., *In re.*

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk.*

H. L. L.

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*August* 1.

## *In re* WILSON (DECEASED).

## HARTLEY *v.* MARIE CURIE HOSPITAL.

[1940. W. 279.]

*Administration—Annuity—Direction to appropriate capital sum to meet annuity—Estate insufficient for legacies and annuities in full—Valuation of annuity and abatement.*

A testator by his will, after giving certain charitable and other legacies, bequeathed an annuity of 200*l.* to H. A. P. during her life, and directed his trustees to appropriate out of his estate a capital sum the income of which would be sufficient to provide the annuity. Any deficiency of income was to be supplied by resorting to capital, and any excess of income was to be treated as income of the residuary estate. After the death of the annuitant the capital, less any sum paid to the annuitant, was to be divided between four named charities. The estate was insufficient for the payment of the legacies and annuities, and the funds directed to be appropriated in full :—

*Held*, following *In re Farmer* [1939] Ch. 573, that the proper course was to value the annuity, and treating the value as a legacy to abate it along with other legacies and pay the abated value to the annuitant, who was a spinster.

*In re Nicholson* [1938] 3 All E. R. 270 not followed.

*In re Carew* [1939] Ch. 794 distinguished.

ADJOURNED SUMMONS.

The summons was taken out by Norman Hartley and John Harry Bromley, the executors and trustees of the will, dated April 3, 1931, of James William Wilson deceased, who died on March 3, 1938.

It raised certain questions as to the construction and effect of the will, which do not call for any report, and the further question how, in the event which had happened of the estate being insufficient to pay the legacies and annuities in full, the trustees ought to compute the capital sum required to meet the payment of an annuity of 200*l.*, or whether it ought to be valued and abated as if the capital value were a legacy.

The material clauses of the will are fully set out in the judgment of the learned judge.

*W. F. Waite* for the plaintiffs.

*Humphrey H. King* for the Marie Curie Hospital.

*H. O. Danckwerts* for the Attorney-General.

*W. T. Elverston* for the annuitant, Hilda Alice Palethorpe. The present case is covered by the decision of Farwell J. in *In re Farmer.* (1) The annuitant is entitled to be paid, being an unmarried woman, the abated capital value of the annuity. The decision of Crossman J. in *In re Nicholson* (2) on a will practically indistinguishable from that in *In re Farmer* (1) is, it is submitted, incorrect, and not in accordance with the authorities: *In re Cottrell* (3); *In re Cox.* (4) The annuity has priority over the interest of the charities, as the testator has directed that in the event of any deficiency of income to meet it, the capital of the appropriated fund shall be resorted to to make it good.

*W. G. H. Cook* for the four charities. The apportioned fund should be treated as one settled legacy, of which the annuitant was tenant for life. The will in the present case is different from those in *In re Farmer* (1) and *In re Nicholson* (2) and more like that in *In re Carew.* (5)

If the two decisions in *In re Farmer* (1) and *In re Nicholson* (2) cannot be distinguished, the latter should be followed, and on these grounds. The annuitant and the four charities are all pecuniary legatees, and should take pari passu if the estate is insufficient. The testator intended to create a settled fund to provide both for the annuitant and the charities. There is nothing to show that the testator intended to give priority to this annuitant over other annuitants and legatees, and unless there are clear words giving such priority, all the legatees abate proportionately.

The testator clearly intended a substantial benefit to these charities, and if the decision in *In re Farmer* (1) is followed they will probably not receive anything at all. If *In re Nicholson* (2) is followed the charities will probably benefit, unless the annuitant should live to a great age and the capital is exhausted by being resorted to to make up income.

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(1) [1939] Ch. 573.

(2) [1938] 3 All E. R. 270.

(3) [1910] 1 Ch. 402.

(4) [1938] Ch. 556.

(5) [1939] Ch. 794.

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Unless an abated fund is invested the testator's true intentions will be defeated. The four charities concerned are not in the same position as the residuary legatees. The decisions in *In re Cottrell* (1) and *In re Richardson* (2) do not apply, because there the corpus of the appropriated fund was, in the cases of the annuities directed to fall into the residuary estate.

*Meyrick Beebee* for a pecuniary legatee argued to the same effect.

BENNETT J. This summons raises a question of administration. If there is a matter about which it is desirable that there should be certainty, it is in regard to the rules that are to be applied in the administration of the estates of dead persons. For myself, until I heard the argument, I should have had little doubt as to what the answer to the first question raised by the summons should be, but in the course of the argument it appeared that there are two recent decisions, one of my brother Farwell J. and one of my brother Crossman J., both exactly upon the point raised by this summons, and these two decisions cannot be reconciled. I have therefore to choose between the two. The question is: What is the method to be applied in abating an annuity of 200*l.* per annum which has been given by the will of this testator, James William Wilson, to Hilda Alice Palethorpe, it being the fact that the estate of the testator is insufficient to pay in full the pecuniary legacies and the annuities that he has bequeathed.

The general rule in such a case is clear and well settled: if a testator has bequeathed annuities and pecuniary legacies and his estate is insufficient to pay the annuities and the legacies in full, the annuities have to be valued. The values are treated as legacies, and abate proportionately with the pecuniary legacies. The annuitants are entitled, unless they are married women restrained from anticipation, to have the abated values of their annuities paid to them. If the annuitant is a married woman restrained from anticipation,

(1) [1910] 1 Ch. 402.

(2) [1915] 1 Ch. 353.

the rule is that the abated value is laid out by the executors or trustees in the purchase of an annuity for the married woman. In this case it is said that the general rule is not to be applied because there are some provisions in the will which, according to the argument of Mr. Cook, convert what looks like an annuity, into a settled legacy. The provisions are contained in clause 7 of this testator's will. These provisions read as follows: "(*a*) I bequeath (free of all "duties payable on my death whether by instalment or in "one sum but not on the death of the annuitant) to the "above mentioned Hilda Alice Palethorpe an annuity of 200*l.* "for her life without power of anticipation during any coverture "to commence from my death and to be considered as accruing "from day to day but to be paid by equal half yearly payments "the first payment to be made at the end of six months after "my death. (*b*) I direct my Trustees to set apart as soon as "conveniently may be and invest in their names in any of "the investments authorised by law with power to vary "investments a sum the income whereof when invested shall "be sufficient at the time of investment to pay the said "annuity and to pay the same accordingly with power to "resort to the capital of the appropriated fund whenever "the income shall be insufficient and until such sum shall "be so appropriated I charge my residuary personal estate "with the said annuity but after appropriation my residuary "estate shall thereby be discharged from the said annuity. "(*c*) During the lifetime of the said Hilda Alice Palethorpe "any surplus income of the appropriated fund shall be applied "in the same manner as income of my residuary estate. "(*d*) On the death of the said Hilda Alice Palethorpe my "Trustees shall divide the appropriated fund or so much "thereof as shall not have been resorted to to make up "deficiency of income equally between (i.) the General "Infirmary at Leeds (ii.) the Women and Children's Hospital "at Leeds (iii.) Doctor Barnardo's Homes and (iv.) the "Salvation Army." These are the provisions of the will which have to be considered in the present case. On behalf of Hilda Alice Palethorpe the argument is that she is an annuitant for the sum of 200*l.*, and as there is an insufficient estate to provide for her annuity and for the other pecuniary legacies the general rule I have stated must be applied. That is in accordance with the rule in administration as it was decided to be by my brother Farwell J. in the case of *In re Farmer* (1) upon the provisions of a will which in substance are indistinguishable in my judgment from the provisions in the will which I have to consider in the present case.

The other contention, advanced on behalf of the four named charities, is this: ascertain the sum required to buy investments to produce by their income the annual sum of 200*l.* and regard that sum as a settled legacy; and abate that sum proportionately with the other pecuniary legacies; invest the abated sum in the purchase of 2½ per cent. Consols and out of the income thereof and so much of the capital as is necessary pay to the annuitant during her life or until the invested sum is exhausted the sum of 200*l.* a year. That is in accordance with the decision of my brother Crossman J. in the case of *In re Nicholson.* (2) The provisions in the will in *Nicholson's* case (2) are I think substantially indistinguishable from those in *Farmer's* case (1) and in the present case. It is said that there is other authority which has a bearing upon the question and two other decisions were referred to, both of them in the year 1939. The first is a decision of my brother Simonds J.: *In re Carew.* (3) There a testatrix directed, after the death of her sister, to whom she gave a life interest in her residuary fund, that her residuary trust fund should be held on certain trusts, namely, to pay to each of the children of one John Warrington Carew (other than Gerald Carew) who should be living at the death of the survivor of herself and her sister, the sum of 250*l.* free of duty, then to pay to her cousin, Mary Brenda Francklyn, during her life, the yearly sum of 500*l.* free of duty, and after her death to hold the capital representing such yearly sum of 500*l.* on such trusts as the said Mary Brenda Francklyn should by will appoint, and if she should die intestate to hold such capital and the income thereof on the trusts thereinafter declared in favour of the children of the said John Warrington Carew. There was a similar direction with regard to the payment of an equal yearly sum to her cousin, Leila Caroline Francklyn, and a similar disposition of the capital representing such yearly sum. There was then a direction to pay a number of other pecuniary legacies of substantial amounts. Finally there was a direction to hold "the residue of the residuary trust "fund" for certain purposes. The estate was deficient and the question was how to deal with the two annuities to the testatrix's cousins, Mary Brenda Francklyn and Leila Caroline Francklyn. Upon the construction of that will my brother Simonds J. came to the conclusion that there was a settled legacy of such sum as, when invested, would produce the yearly sum of 500*l*. and abatement was to take place upon the footing of that construction. It seems to me that that case has got nothing whatever to do with the case that I have to decide here. It is not possible in my judgment, as a matter of construction, to hold that by clause 7 of this testator's will, he has settled a legacy upon anybody. He has done no such thing; all he has done is to give an annuity of 200*l*. The other case relied upon is in the same volume of the Law Reports: *In re de Chassiron* (1), a decision of my brother Morton J. That is also a case in which the decision, as it seems to me, rests upon the particular wording of the will which my brother Morton J. there had to consider. It has no possible bearing, in my judgment, upon the question raised by this summons; and therefore it falls to me to decide whether the rule laid down by my brother Farwell J. in *In re Farmer* (2) or the rule laid down by my brother Crossman J. in *In re Nicholson* (3) is the right one. For myself I feel no doubt about it. Clause 7 of this will gives Hilda Alice Palethorpe an annuity of 200*l*. during her life. All the other provisions contained in clause 7 are, in my judgment, merely administrative provisions subsidiary to

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(1) [1939] Ch. 573.
(2) [1938] 3 All E. R. 270.
(3) [1939] Ch. 794.

(1) [1939] Ch. 934.
(2) [1939] Ch. 573.
(3) [1938] 3 All E. R. 270.

that bequest put into the will for the purpose first of securing the annuity and secondly of freeing the testator's estate from the charge imposed upon it to pay the annuity. The interests of the four charities are subject to and subsidiary to the interest of the annuitant. In my judgment there is not any sum settled upon trusts for the benefit of the four charities. It is not possible, having regard to the insufficiency of the testator's estate, to do what the testator directed his trustees to do for the purpose of securing the annuity, namely, to set aside the securities producing an income sufficient to satisfy the annuity. It seems to me there is nothing to touch or affect the general rule of administration established for many years in regard to an annuitant where the estate of the testator is insufficient to pay in full an annuity and pecuniary legacies. The general rule, in my judgment, must be applied : the annuity must be valued, and the value abated proportionately with all the other pecuniary legacies. The annuitant being, as I understand it, not a married woman, is entitled to have paid to her the abated value of her annuity. The annuity will be valued as at the death of the testator.

Solicitors : *Haslewood, Hare & Co., for C. V. Walker, Leeds*; *Bolton, Jobson & Yate-Lee ; The Treasury Solicitor ; Arthur Pyke & Co. ; Frank Taylor & Nightingale, for Dibb, Lupton & Co., Leeds.*

H. L. L.

# *In re* PARSONS.

BENNETT J.

1940

July 24; Aug. 28.

## BARNSDALE AND SMALLMAN *v.* PARSONS.

[1940. P. 1361.]

*Infant—Settlement—Infant beneficiary—Power in settlement to beneficiary to appoint new trustee—Appointment by beneficiary while infant of mother as sole trustee—Validity.*

A settlement directed the trustee thereof to stand possessed of the settled fund for the maintenance, education and benefit of the settlor's son, who was then nine months old, and, on the son's attaining the age of twenty-five, on trust for the son absolutely.

Clause 6 of the settlement was: "The power of appointing "new trustees of these presents shall be vested in the settlor "during his life and after his death in the said Norman John "Bridges Parsons" (the son) "and after the death of the survivor "of them in the trustee for the time being of these presents."

At a date when the settlor and the original trustee were dead the son, who was still under twenty-one years of age, purported by deed to appoint his mother to be sole trustee of the settlement in the place of the original trustee.

On a summons to determine whether the appointment was valid, having regard to the fact that the son was an infant:—

*Held*, (1.) that it was not clear, on the face of the settlement, that the settlor contemplated that the power might be exercised during the son's minority;

(2.) That an infant will not be bound by any act which is either imprudent or prejudicial to his interest or which, where he is executing an authority entrusted to him, touches his interest;

(3.) That it was an imprudent act to appoint a single trustee of the trust fund in the present case, and also an imprudent act for the son to appoint the mother, who need account to no one, and whose duty must often clash with her interest. The son, in executing his authority under the settlement, was touching his interest and, accordingly, the appointment was not valid and did not bind him.

*In re D'Angibau* (1880) 15 Ch. D. 228, and *In re Cardross's Settlement* (1878) 7 Ch. D. 728, considered and distinguished.

Judgment of Lord Mansfield C.J. in *Zouch d. Abbot and Hallet* v. *Parsons* (1765) 3 Burr. 1794, 1801, considered and applied.

ADJOURNED SUMMONS.

This summons was issued to determine whether the appointment, by an infant beneficiary under a settlement, of his mother as sole trustee of the settlement, was valid.

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The settlement, made on November 9, 1920, by Mr. Norman Ernest Parsons directed the trustee to stand possessed of the settled fund in trust for the maintenance, education and benefit of the settlor's son, Norman John Bridges Parsons, and, on the son's attaining the age of twenty-five, in trust for him absolutely: and it provided that the power of appointing new trustees should be in the settlor for life, after his death in the son, and after the survivor's death in the trustee for the time being of the settlement.

At a date when the settlor and the original trustee were both dead, the son, who was under twenty-one years of age, purported by deed to appoint his mother, Mrs. Marion Frances Jessie Parsons (who, also, was one of the settlor's surviving personal representatives) to be sole trustee of the settlement in the place of the original trustee.

By this summons, taken out on May 23, 1940, Mr. Arthur Barnsdale and Mr. George Augustus John Smallman, the original trustee's personal representatives, asked (inter alia) whether the mother had been validly appointed trustee by the deed, having regard to the fact that the son was an infant. The defendants to the summons were the mother, the son, and Mr. Harold Edward Stewart Parsons, the testator's other surviving personal representative.

*Bushe-Fox* for the plaintiffs.

*Hewins* for the mother and the son. This is a valid appointment despite the son's infancy. No question is raised as to its propriety. There is no authority directly on the point, but there are certain cases on the exercise of other powers by infants. [He referred to *In re D'Angibau.* (1)] An infant can exercise a power in gross: and the power in the present case is either that or a collateral power over personal estate. Also, if it be argued that the power here to appoint new trustees is a power appendant over property in which the infant has an interest, the authorities establish that even such a power as that can be exercised by an infant where the instrument conferring the power, construed in the light of the

(1) 15 Ch. D. 228.

surrounding circumstances at the date of its execution, shows an intention that the power shall or may be exercised during infancy. This settlement, so construed, does show that intention by the settlor. The fact that the exercise of some discretion is required has not been held to be a reason why an infant cannot exercise a power to appoint new trustees. [He referred to *In re Cardross's Settlement* (1); *Hearle* v. *Greenbank* (2); *In re Sutton* (3); *King* v. *Bellord* (4), Farwell on Powers, 3rd ed., p. 11, and Simpson on Infants, p. 10.]

*Mendel* for the settlor's other surviving personal representative.

In the present case the power is either appendant or sui generis. If it affects the infant's interest it is appendant. If it does not affect an interest in property at all it is sui generis. If it is sui generis, there is no authority that in such a case an infant can appoint a trustee. [He referred to Simpson on Infants, p. 1, and Farwell on Powers, p. 142.] Here it cannot be inferred from the terms of the settlement that the settlor intended the son to exercise the power during his infancy. The power is sui generis, and the son's exercise of it during his infancy ought not to be upheld.

*Cur. adv. vult.*

1940. Aug. 28. BENNETT J. This summons raises an interesting question of law upon which there is no direct authority. The question is whether an infant can exercise a power of appointing a new trustee of a settlement.

By an indenture of settlement dated November 9, 1920, and made between Norman Ernest Parsons (thereinafter called "the settlor") of the one part, and Sir Herbert J. F. Parsons (thereinafter called "the trustee") of the other part, after reciting that the settlor was possessed of ordinary shares of and in a named limited company and had transferred two hundred and fifty of such shares into the name of the trustee to the intent that the same should be held upon the trusts and with and subject to the powers and provisions

(1) 7 Ch. D. 728.
(2) (1749) 3 Atk. 695, 708.
(3) [1921] 1 Ch. 257.
(4) (1863) 1 H. & M. 343.

thereinafter declared and expressed, it was witnessed by clause 1 that the trustee should stand possessed of the said shares upon trust to apply the income arising therefrom or so much as he should think fit for the maintenance, education and benefit of the infant defendant, Norman John Bridges Parsons, until he should attain the age of twenty-five. By clause 2 the trustee was given a discretion as to the manner in which the said income should be applied for the benefit of the infant defendant and it was provided that he should be at liberty, if he should think fit, to pay the same to his father or mother, whose receipt should be a full and sufficient discharge. In clauses 3 and 4 there were provisions regarding the sale of the said shares and the investment of the proceeds of sale. By clause 5 it was provided that when and so soon as the said infant defendant should have attained the age of twenty-five the trustee should stand possessed of the said shares or the securities for the time being representing the same upon trust for the said infant defendant absolutely. Clause 6 provided that the power of appointing new trustees should be vested in the settlor during his life and after his death in the said infant defendant, and after the death of the survivor of them in the trustee for the time being of the said indenture.

The settlor died on November 18, 1926. The trustee, Sir Herbert Parsons, died on February 2, 1940. The plaintiffs are the executors of his will, which was proved on April 18, 1940. The infant defendant was born on February 10, 1920, and on April 21, 1940, being then an infant, he executed a deed whereby he purported to appoint his mother, the defendant Marion Frances Jessie Parsons, sole trustee of the said indenture of settlement. The shares originally settled have been sold and are now represented by investments of a value of about 20,000*l.* Not unnaturally the plaintiffs, before transferring the trust fund to a sole trustee appointed by an infant, wish to know whether, having regard to the fact that the appointor was an infant, the deed of appointment is a valid and effectual instrument. The infant defendant was about ten months old when the settlement was made. He is now an officer in the Royal Navy. Both the infant defendant and his mother supported the appointment. Its validity was questioned by the defendant, Harold Edward Stewart Parsons, one of the personal representatives of the settlor, whose estate would, of course, be entitled to the settled fund if by some misfortune the infant defendant should die under the age of twenty-five.

As I stated at the beginning of my judgment there is no direct authority upon the question raised. Those who supported it argued, first, that the power was either a power in gross or a collateral power over personal estate, and being such might be executed by an infant, relying upon the authority of *In re D'Angibau* (1) to support the argument. That was a case in which a question arose as to the validity of an appointment made by a married woman who was an infant disposing of personal property comprised in a marriage settlement. By the settlement, which was made in the year 1874, it was agreed that after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of the will of the lady's father in which the lady would take a vested interest at twenty-one or earlier marriage, subject to an annuity for her mother's life, should be assigned to trustees in trust to pay the income to the lady for life and after her death to her husband until bankruptcy or alienation and then, in the event that happened, to hold the capital on trust for such person or persons as the lady should by deed or will appoint. The lady appointed the fund to her husband by deed, and died being still an infant. The appointment by her was held valid by a majority of the Court of Appeal, affirming the decision of Sir George Jessel. It was not disputed that the exercise by an infant of a collateral power was valid both as regards real and personal estate. What was in question was the validity of the exercise by an infant of a power in gross over personal estate. Sir George Jessel, for the purposes of his judgment, stated what he meant by the phrases power collateral, power in gross and power appendant, respectively. I will read his language (2): "The first power, a power simply collateral, I understand to "be a power given to a person who has no interest whatever

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(1) 15 Ch. D. 228.

(2) Ibid. 232.

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"in the property over which the power is given. The second "power, a power in gross, is a power given to a person who "has an interest in the property over which the power extends, "but such an interest as cannot be affected by the exercise "of the power. The most familiar instance is that of a tenant "for life with a power of appointment after his death. Then "the third kind of power is a power exercisable by a person "who has an interest in the property, which interest is "capable of being affected, diminished or disposed of to "some extent by the exercise of the power. That power is "commonly called a power appendant or appurtenant." Having so defined the phrases the Master of the Rolls came to the conclusion that the power in question, being a power in gross over personal estate, was exercisable by an infant. His decision was affirmed by a majority of the Court of Appeal. I do not think that *In re D'Angibau* (1) is an authority upon the point in issue, having regard to Sir George Jessel's definitions. A power to appoint a new trustee differs technically from a power to dispose of property in which an infant has no interest and from a power to dispose of property in which the infant has an interest but an interest which cannot be touched by the execution of the power, for the exercise of such power cannot prejudice an infant and does not touch or concern the infant's interest in property. A power to appoint to an office, such as the office of a trustee, may vitally affect the infant's interests if he has a beneficial interest in the property the subject of the trust, and may also prejudice him and his pecuniary interest.

It was also argued on behalf of the infant defendant and his mother that the settlement in question showed an intention on the part of the settlor that the infant defendant should execute the power notwithstanding his infancy. In support of this argument the fact that the power was expressly given to the infant defendant after the settlor's death was relied on. It was argued that the settlement showed a manifest intention that the infant should execute the power. This argument was advanced on the authority of *In re Cardross's Settlement.* (2)

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(1) 15 Ch. D. 228, 232.

(2) 7 Ch. D. 728, 729, 730.

In that case a settlement had been made on the occasion of the marriage of Lady Cardross, an infant ward of Court, she being described in the settlement as "an infant of 17 "years and upwards." Certain investments, the property of Lady Cardross, were vested in trustees upon trust after the solemnization of the marriage to retain the existing investments or to re-invest as therein mentioned with the consent of Lady Cardross and her husband during their joint lives and after the decease of either of them with the consent of the survivor of them, and after the death of such survivor at the discretion of the trustees. While Lady Cardross was still a minor a re-investment of part of the trust fund arose, and the question was whether, she being a minor, she was able to give her consent. The matter came before Sir George Jessel M.R. In the course of his judgment the Master of the Rolls said this: "Now when you look at the settlement "it is manifest that in giving this power, exercisable during "the joint lives of Lord and Lady Cardross, it was contemplated "that it might have to be exercised during their joint lives "and possibly during the minority of Lady Cardross. Indeed, "it would be most improbable that some change of investment "would not be required or be found desirable before Lady "Cardross attained twenty-one. Therefore, on the face of "this settlement, there is evidence of contemplation on the "part of the author of this power that the power might be "exercised during minority." He then considered, on that intention being manifest, whether it was sufficient to remove the disability of infancy, and having considered the authorities decided that it was. In my judgment it is not manifest upon the face of this settlement that the author of it contemplated that it might be exercised during the minority of the infant defendant. Supposing the settlor and the original trustee had died a few weeks after the date of the settlement, it is inconceivable that the settlor could have contemplated the exercise of the power by an infant unable to speak or read or write. When the relevant and admissible facts are proved there is, in my judgment, no foundation for the argument that an intention appears on the face of this settlement that the donee of the power of appointing new trustees should execute it during infancy.

The question then seems to be one which must be answered by reference to first principles. Infancy does not produce in a person a total incapacity to act. There are many acts which an infant may do and by which he is bound. There are others which are absolutely void and of no effect, others which are voidable only. There are numerous authorities, through all of which it is unnecessary to travel, if the principles can be extracted. Upon the question of principle I will refer first to Littleton, s. 259, which I will read: "And "it is to be understood, that when it is said, that males or "females be of full age, this shall be intended of the age of 21 "yeares; for if before such age any deed . . . . or feoffement, "grant, release, confirmation, obligation, or other writing, "be made by any of them, &c. or if any within such age be "baylife or receiver to any man, &c. all serve for nothing, "and may be avoided." The first commentary of Sir Edward Coke in this section is at page 171 (*b*), and is as follows: "The "law hath provided for the safety of a man's or woman's "estate, that before their age of twentie one yeares they "cannot binde themselves by any deed, or alien any land, "goods or chattels," and later on, on page 172 (*a*) he has some comments upon the words of Littleton: "' Or other writing, "' be made by any of them, &c.' Here by this &c. is implied "some exceptions out of this generality, as an infant may "bind himselfe to pay for his necessary meat, drinke, apparell, "necessary physicke, and such other necessaries, and likewise "for his good teaching or instruction, whereby he may profit "himselfe afterwards: But if he bind himselfe in an obligation "or other writing with a penalty for the payment of any of "these, that obligation shall not bind him. Also other things "of necessity shall bind him, as a presentation to a benefice, "for otherwise the laps shall incur against him. Also if an "infant be an executor upon payment of any debt due to the "testator, he may make an acquittance; but in that case a "release without payment is voyd; and generally whatsoever "an infant is bound to do by law, the same shall bind him, "albeit he doth it without suit of law. But of this common "learning this little tast shall suffice." Next I will refer to a case which has the high authority of Lord Mansfield C.J., *Zouch d. Abbot and Hallet* v. *Parsons.* (1) In that case one John Bicknell conveyed a messuage in lands to one William Cook by way of mortgage to secure a sum of 280*l.* William Cook died leaving John Lamb Cook, an infant, his eldest son and heir, and also leaving his widow Elizabeth Cook and the said John Lamb Cook his joint executors and residuary legatees. When John Lamb Cook was between sixteen and seventeen years of age, by indenture of lease and release made between the said John Lamb Cook and his mother, of the first part, the said John Bicknell, the mortgagor, of the second part, and Abbot and Hallet, the lessors of the plaintiff, of the third part, the said John Lamb Cook and his mother in consideration of 280*l.* conveyed the premises to Abbot and Hallet in fee. The question was whether that conveyance bound the infant. The Court of King's Bench held that it did. Lord Mansfield on page 1801 begins the reasoning of his judgment in this way: "The merits of this cause turn upon two general "questions: first, Whether this conveyance is good, and binds "the infant; secondly, If it does not bind the infant, whether "the defendant can take advantage of the infancy, and on that "account object to it. As to the first—miserable must the "condition of minors be; excluded from the society and "commerce of the world; deprived of necessaries, education, "employment, and many advantages; if they could do no "binding acts. Great inconvenience must arise to others, "if they were bound by no act. The law, therefore, at the "same time that it protects their imbecility and indiscretion "from injury through their own imprudence, enables them to "do binding acts, for their own benefit; and, without prujudice "to themselves, for the benefit of others." The last sentence is a pregnant one and really holds in it all the law regarding the disabilities caused by infancy. Infants will be protected from injury through their own imprudence. The law permits them to do binding acts (*a*) if they are for their own benefit, or

(1) (1765) 3 Burr. 1794.

(*b*) if they are for the benefit of others and do not prejudice themselves. It necessarily follows that the law will avoid imprudent acts done by infants and acts done by infants for the benefit of others but prejudicial to their own interests. Lord Mansfield then proceeds to mention a rule or two which I will read: "If an infant does a right act which he ought to "do, which he was compellable to do, it shall bind him; as "if he makes equal partition; if he pays rent; if he admits "a copyholder, upon a surrender. But there is no occasion "to enumerate instances; the authorities are express; and "the reason decisive—'generally, whatsoever an infant is "'bound to do by law, the same shall bind him, albeit he doth "'it without suit of law'." Then he says: "Another rule, "which may be collected from the books, is 'that the acts "'of an infant, which do not touch his interest, but take "'effect from an authority which he is trusted to exercise, "are 'binding'; as, where an infant-patron presents; an "infant-executor duly receives and acquits, pays and administers the assets; an infant-head of a corporation joins "in corporate-acts; an infant-officer does the duty of an "office which he may hold. A third rule deducible from the "nature of the privilege, which is given as a shield, and not "as a sword, is 'that it never shall be turned into an offensive "'weapon of fraud or injustice.' As, where tenant for life and "infant in remainder levied a fine—the infant reversed the "fine, as to himself, for the inheritance, for nonage; yet he "shall be bound by his assent to the fine and joining in it, not "to enter for the forfeiture. And the fine was held good, as "to the estate of tenant for life; and reversed quoad the "infant only."

I will now consider whether the reasons of these rules are applicable to the present case, premising that I deduce from what Lord Mansfield said that an infant will not be bound by any act which is either imprudent or prejudicial to his interests or which (where he is executing an authority with which he is entrusted) touches his interest. It is not necessary to decide whether the deed of appointment in question in the present case is void or voidable. The trust fund here is of a value of about

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20,000*l*. The income of it is applicable for the maintenance, education and benefit of the infant until he attains twenty-five. A trustee is authorized to pay the income to the infant's mother until he attains twenty-five. On attaining twenty-five the infant becomes absolutely entitled to the capital.

In my judgment it is an imprudent act to appoint a single trustee of such a fund, whoever he or she may be. The Court would never make such an appointment. In my judgment it is an imprudent act to appoint the particular person selected by the infant to be sole trustee, for she need account to nobody and must often find herself in a position in which there must be a conflict between her duty and her interest. In my judgment, in executing the authority entrusted to him by the settlement, the infant is touching his interest. He is touching his interest in the trust fund.

For these reasons the infant is not bound by the appointment he purports to have made, and I answer the question asked by the summons by saying that the defendant, Marion Frances Jessie Parsons, has not been validly appointed to be a trustee of the settlement in question.

Solicitors: *Smallman & Son*; *Woolfe & Woolfe.*

K. R. A. H.

SIMONDS J.

1940 July 31.

## *In re* LAWTON (DECEASED).

## LLOYDS BANK, LIMITED *v.* LONGFLEET ST. MARY'S PAROCHIAL CHURCH COUNCIL.

[1940. L. 1657.]

*Charity—Residuary bequest to trustees of parish church—For any purpose permitted by trust deed—No trustees or trust deed in existence—No general charitable intention—Gift void for uncertainty.*

A testator by his will gave all his residuary estate to the trustees of a parish church to be used by them in their discretion for any object or purpose permitted by the trust deed under which they operated. There was no such trust deed, nor were there any trustees, and there never had been any trustees or trust deed in relation to the parish church:—

*Held*, that, there being no general charitable intention shown in the will, the bequest failed for uncertainty.

*Aston* v. *Wood* (1868) L. R. 6 Eq. 419 followed.

ADJOURNED SUMMONS.

The summons was taken out by the plaintiffs as trustees of the will of Edward Acton Lawton for the determination of the effect and validity of the residuary bequest and devise therein. The testator devised and bequeathed all the residue of his estate to the trustees for the time being of the Church of St. Mary in the parish of Longfleet, Poole, Dorset, to be used by them in their absolute discretion for any purpose or object permitted by the trust deed under which they operated. No trustees or trust deed of any church funds in the parish had ever existed, but the bequest was claimed by the Parochial Church Council as a valid charitable bequest for the benefit of the church.

*C. D. Myles* for the plaintiffs.

*A. C. Nesbitt* for the Longfleet Parochial Church Council.

The gift is a valid charitable bequest. There is no question of uncertainty. The testator had a dominant charitable intention, to benefit the church. The fact that there are no trustees and no trust deed makes no difference; the words are an erroneous description of the legatees and should be struck out of the will. There might have been trustees of church funds appointed under the Compulsory Church Rate Abolition Act, 1868, and if there had been, their powers, duties and liabilities would have been taken over by the Parochial Church Council under the Parochial Church Council (Powers) Measure, 1921, s. 4, sub-s. (iii.). A general charitable intention, such as is shown, must be carried into effect, if necessary, cy près : see *Moggridge* v. *Thackwell* (1) ; *Mills* v. *Farmer.* (2)

*J. T. Molony* for the next of kin. This is a gift to persons who do not exist, for an unspecified purpose, and therefore it fails for uncertainty. There is no general charitable intention shown. What is important is not who the trustees are, but who the beneficiaries are, and this is left uncertain. The case is very similar to *Aston* v. *Wood* (3), where a gift to the trustees of the Mount Zion Chapel, without specifying the object of the trust, was held to fail : *In re Freeman.* (4) Purposes connected with a parish church are not necessarily religious and charitable : *Farley* v. *Westminster Bank.* (5) From the fact that reference is made to a supposed document, which has no existence, it cannot be inferred that the deed if it did exist would have created a purely charitable trust.

*H. O. Danckwerts* for the Attorney-General. If the reference to the trustees is cut out as a misdescription, then it is a gift to the church simpliciter, and a valid charitable bequest as being for the advancement of religion : *In re Garrard.* (6) The church, not the parish, is the centre of the bequest : *In re Bain* (7), per Lord Hanworth M.R.

[SIMONDS J. Trustees of a church may mean anything or nothing. In the cases cited the gift was to the vicar of the parish or the vicar and churchwardens.]

There is no reference here to parish or parochial objects ; the testator was thinking of the church.

SIMONDS J. This summons raises a question which appears

(1) (1802–7) 7 Ves. 36.
(2) (1815) 1 Mer. 55.
(3) (1868) L. R. 6 Eq. 419.
(4) [1908] 1 Ch. 720.
(5) [1939] A. C. 430.
(6) [1907] 1 Ch. 382.
(7) [1930] 1 Ch. 224.

to me to be of very considerable difficulty. By his last will, the testator, after appointing an executor and trustee and giving certain directions which are not material for me to state, gave, devised and bequeathed the residue of his estate "to the trustees for the time being of the Church of Saint "Mary in the parish of Longfleet, Poole, Dorset, to be used by "them in their absolute discretion for any purpose or object "permitted by the trust deed under which they operate." There are no trustees and there is no trust deed under which they operate, and, so far as the evidence goes, there never have been trustees, and there never has been a trust deed. It is obvious, therefore, that the gift must fail unless I can find a general charitable intention, in which case effect would be given to the intention by a scheme or otherwise ; for it is a cardinal principle that, where you find a general charitable intention, the gift does not fail by reason of want of trustees or by reason of the particular object benefited by the testator having ceased to exist. Therefore the question here for my consideration is whether, on the language of this will, I can find a general charitable intention in the gift.

I think that there is no branch of the law so artificial or in which it is so difficult to reconcile conflicting authorities as this question of general charitable intention. After such consideration as I have been able to give to the case, I must come to the conclusion that here no general charitable intention is established. It is impossible for me to assume of a deed which is not in existence, and so far as I know never has been in existence, that its terms would have been such that no purpose or object of a non-charitable character would have been comprised in it. I disregard that, however, and, for the purpose of considering this question, look to see whether, had the gift been merely to " the trustees of the church " and no more, I should have been justified on the authorities in finding a general charitable intention.

It seems to me that the nearest case to this is *Aston* v. *Wood* (1), where the gift was in these terms : " I give to the trustees of Mount Zion Chapel, where I attend, 3500*l.*, and

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(1) L. R. 6 Eq. 419.

"appoint as trustees to the same James W. Aston (my "nephew), and Thomas Green, Dove's Hill. And I direct that "their receipt shall be a sufficient discharge to my executors, "and the money to be appropriated according to statement "appended." There was no statement appended. It was argued there that the Court could presume a charitable object for the bequest because it was to trustees of the Mount Zion Chapel, and the fact that no statement was appended, it was argued, ought not to affect the general charitable intention. That argument failed, and Vice-Chancellor Sir George Giffard said: "But as there is no statement appended I cannot "possibly tell or infer that the purpose thus intended to be "referred to was charitable; and if it was not charitable then "the object of the bequest is clearly so indefinite that the gift "must fail."

In the present case it has been argued that, since the deed is not forthcoming, it must be inferred that the objects were charitable because the gift was to trustees of the church. But a gift to trustees of a church is not to be presumed to be charitable any more than to trustees of the Mount Zion Chapel. Taking that as my authority, I must come to the conclusion here that the gift to the trustees is not to be presumed to be a gift for charitable purposes. It is obvious that the trustees of a church might hold a fund as well for non-charitable as for charitable purposes, and it appears to me that, if it was intended that the gift should be merely for ecclesiastical purposes which are charitable, the obvious course would have been to have made the gift to the vicar and churchwardens, or to the vicar alone, in which case, according to the well established law, it would have been held that that gift was held by the donees for ecclesiastical and therefore charitable purposes. As I have said, the dividing line between one class of case and another is very fine, but on the whole I must come to the conclusion that the gift is not a charitable gift.

Solicitors: *Peacock & Goddard, for Trevanion & Curtis, Poole; Church, Adams, Tatham & Co., for Dickinson, Manser, Brandreth & Yeatman, Poole; Treasury Solicitor.*

H. L. L.

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J.

1940
July 18.

## *In re* DIPLOCK.

## WINTLE *v.* DIPLOCK.

[1940. D. 1041.]

*Will—Construction—Gift of residue—" Charitable or benevolent object or objects "—Whether gift valid.*

A testator having by his will bequeathed legacies of 20,000*l.* and 5000*l.* to friends, some small legacies to servants and " charitable legacies " of 5000*l.* and 20,000*l.* respectively to certain charitable institutions directed his executors to " apply " the residue for such charitable institution or institutions or " other charitable or benevolent object or objects in England " as they should in their absolute discretion select, declaring that the receipt of the proper officer " of any hospital, home or other " institution " should be a sufficient discharge for any legacy :—

*Held*, that a valid charitable trust was created as, on the true construction of the will there was sufficient to indicate an overriding intention to benefit charitable objects only, and that the use of the words " or benevolent object or objects " did not compel the Court to hold that the gift was invalid.

ADJOURNED SUMMONS.

The testator, Caleb Diplock, who made his will on November 3, 1919, died on March 23, 1936. He had no near relations. By clause 2 of his will, he gave a legacy of 20,000*l.* to a friend, who predeceased him ; by clause 3 he bequeathed to the same friend a freehold estate ; by clause 4 he gave a legacy of 5000*l.* to another friend, and some small legacies to servants. By clause 5 he provided : " I give the following "charitable legacies, free of duty, namely : To the Princess "Alice Memorial Hospital the sum of five thousand pounds "to be applied for the general purposes thereof. To my "executors the sum of twenty thousand pounds to be distributed amongst such hospitals, homes and institutions for "officers and soldiers, wounded, maimed, blinded and disabled "in the recent war as my acting executors may in their "absolute discretion select and to be paid in such manner "and in such shares and proportions as such executors in "their uncontrolled discretion shall think fit and proper." By clause 6, the testator provided : " I give the residue of "my property to my executors upon trust to sell or call in "the same, with power to postpone such sale or calling in "without being responsible for loss, and out of the proceeds "of such sale and calling in and out of my ready money my "executors shall pay my funeral and testamentary expenses "and debts and the legacies bequeathed by this my will and "the duty on any legacies hereinbefore given free of duty "or any codicil hereto and subject thereto shall apply the "residue for such charitable institution or institutions or "other charitable or benevolent object or objects in England "as my acting executors or executor may in their or his "absolute discretion select and to be paid to or for such "institutions and objects, if more than one, in such proportions as my executor or executors may think proper." By clause 7 the testator provided: "I declare that the receipts of "the treasurer or other proper officer for the time being of any "hospital, home or other institution shall be a sufficient discharge for any legacy bequeathed, given or applied thereto."

The executors distributed the residuary estate, which amounted to more than 250,000*l*., among about one hundred and thirty charitable institutions. Subsequently it was suggested, on behalf of persons interested as next of kin of the testator, that the gift was invalid. Accordingly, on June 10, 1940, the executors took out a summons to determine whether the disposition of the residuary estate was a valid charitable gift.

*Leonard Stone* for the executors.

*Fawell* for the next of kin. The residuary gift is invalid and the Court will not give effect to it because the objects indicated are so uncertain that they could not be controlled by the Court. The gift is not confined to charities in the strict sense, the words "or benevolent" having extended it to embrace other objects. It is concluded by the authorities that such a gift must fail, irrespective of any question of construction, even though the effect may be contrary to the intention of the testator. [He referred to *Morice* v. *Bishop of Durham* (1); *Ellis* v. *Selby* (2); *In re Jarman's Estate.*

(1) (1804) 9 Ves. 399.

(2) (1836) 1 Myl. & Cr. 286.

*Leavers* v. *Clayton* (1); *Hunter* v. *Attorney-General* (2); *Attorney-General for New Zealand* v. *Brown* (3); *Houston* v. *Burns* (4); *In re Horrocks. Taylor* v. *Kershaw.* (5)]

*Charles Harman K.C.* and *Wigglesworth* for charities benefiting under the will. This is a perfectly good gift and there is no uncertainty. It is inconceivable that the testator should have intended the words "or benevolent" (which were probably the result of a draftsman's slip) to add to the ambit of the gift. The phrase "charitable institution or institutions" qualifies these words which must be read ejusdem generis with it. The whole will indicates an overriding charitable intention, to which the words "or benevolent" are subject. The trustees have in fact only benefited charitable institutions. [They referred to *Dolan* v. *MacDermott* (6); *Lewis* v. *Allenby* (7); *In re Best. Jarvis* v. *Birmingham Corporation* (8); *In re Bennett. Gibson* v. *Attorney-General* (9); *In re Ludlow. Bence-Jones* v. *Attorney-General* (10); *In re James. Grenfell* v. *Hamilton.* (11)]

*Wilfrid Hunt* for another charity adopted this argument.

*Sir Donald Somervell A.-G.* and *Andrewes Uthwatt* for the Crown. At the most, benevolent objects can go very little beyond objects which are strictly charitable in law. The Courts have been astute to find an overriding intention to confine such gifts to charitable purposes. Here there is clearly a general charitable intention and everything outside the legal conception of charity should be cut out from the meaning of "benevolent" in this will.

*Fawell* in reply.

Farwell J. [having stated the facts:] So far as this summons is concerned, the question is simply whether or not, on the true construction of this particular will, the residue is validly disposed of. The fact that the executors have acted in perfectly good faith in their distribution of it among charitable objects and institutions, cannot, of course, affect in any way the true construction of the will and if, on that construction it has not been validly disposed of, then the fact that the distribution has been so made, cannot make the ultimate gift valid.

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(1) (1878) 8 Ch. D. 554.
(2) [1899] A. C. 309.
(3) [1917] A. C. 394.
(4) [1918] A. C. 337.
(5) [1939] P. 198.
(6) (1868) L. R. 3 Ch. 676.
(7) (1870) L. R. 10 Eq. 668.
(8) [1904] 2 Ch. 354.
(9) [1920] 1 Ch. 305.
(10) (1923) 93 L. J. (Ch.) 30.
(11) [1932] 2 Ch. 25.

That being so, I must consider this question purely as one of construction and I have to see what was the intention of the testator as expressed in the language of his will. It has been argued on behalf of the next of kin that the residuary gift is invalid on the ground that the objects to which the residue is to be devoted are uncertain, and that the Court will never give effect to a gift which is so uncertain as not to be capable of being controlled by it. It is said that, although, if the gift of the residue were confined to charities within the strict meaning of the word " charity," there could be no question but that it was valid, its ambit is extended so as to embrace objects which are not charitable and that accordingly the whole gift fails. So far as a gift is charitable, this Court can control it. In the case of a misuse of charitable funds; His Majesty's Attorney-General can move the Court to prevent such misuse and call upon the trustees to replace them. But in the case of a gift to objects some but not all of which are charitable, there is no such remedy open to anyone ; the Court cannot control the application of the fund if the trust is not confined within the meaning of the word " charitable," and it has been held that in such a case the gift is altogether invalid, so that, in the case of a residuary gift, the residue is undisposed of.

In this case I am faced with the difficulty that the gift of the residue is for " such charitable institution or institutions "or other charitable or benevolent object or objects in England "as my acting executors or executor may in their or his "absolute discretion select." If the words " or benevolent " were not there, or even if the word " or " were changed to "and," there could, I think, be no question but that this gift would be perfectly good, but the use of the words " or "benevolent " does give rise to a very serious question. It has been held many times that the word " benevolent " by itself does not necessarily include those objects only which are " charitable " within the meaning of the word as understood in these Courts but that by itself it is wide enough to embrace objects which are not charitable. It has also been held that using the word " charitable " as an alternative to "benevolent " may result in the same uncertainty, because it may imply a discretion to the executors to apply the fund either for a charitable purpose or for one which is not charitable although it may be benevolent ; if that is within the scope of their powers, it renders the whole gift invalid, because the objects are uncertain. The authorities, I think, establish that the meaning of the word " benevolent " is not prima facie "charitable " and it cannot be so read in a case where the word " benevolent " is treated as opposed to " charitable."

It has been argued on behalf of the next of kin that the authorities have decided this question in such a way that it is not open to me to come to any other conclusion than that in this case the gift of the residue fails, and that the the use of the words " or benevolent object or objects," compels me to come to a conclusion which, in my judgment, is entirely contrary to the intention of the testator as disclosed in the language he has used. It is said that that is the result to which, sitting as a judge of first instance, I am compelled to come ; and accordingly that there is an end of the matter, because whatever my own view as to the construction of this will should be, I am bound in view of the authorities, to come to the conclusion that this gift is invalid.

In my judgment that is a misconception of the true use of authorities. In a case where the Court is being asked to construe a will there are, no doubt, certain rules of construction which it must observe, but when it is a question of determining the meaning of certain words read in conjunction with other words, and of reading the whole will so as to ascertain the true intention of the testator from the language used, then it is, I think, a fallacy to say that the Court is necessarily bound to approach the question of intention blindfolded, because of the decision, even a decision of the House of Lords,

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in some other case of construction where the same words were used in a different connection, and that such a decision is necessarily binding in every other case where those words appear, although the connecting language as a whole may not be the same. The fact that other Courts have come to a particular conclusion as to the meaning of such words as "benevolent" is, of course, a matter which this Court must take into the most careful consideration; and if there is a definite authority binding on it that in every case "charitable or "benevolent" must be construed so as to render a gift of this kind invalid, no doubt effect must be given to it. But there is, in my judgment, nothing in any binding authority cited to me, which creates that position, the truth of the matter being that the Court in each case has to consider the actual language of the testator. It may have to put particular meanings on certain words owing to the fact that there are authorities which have settled the matter; but it must read the will as a whole and see what was the intention of the testator; and in my judgment, in reaching a conclusion in such a case as this, I am not precluded from giving effect to what I am satisfied, from the language which he has used, was his true intention.

In the present case I approach this question in the light of certain facts which I am entitled, in my view, to take into consideration. The testator was a gentleman who apparently had no near relations whom he desired to benefit. He divided his property up by giving to a friend (who predeceased him) a considerable sum of money and an estate. He gave the sum of 5000*l.* to another friend and small legacies to his servants. Those are all the dispositions which he made apart from what may be called his charitable gifts. He next gave legacies, which he himself described as "charitable "legacies" (and that they were charitable there can, of course, be no doubt) of 5000*l.* for a particular hospital, and 20,000*l.* to be distributed amongst hospitals and institutions of a certain class. Therefore it is clear that in the latter part of his will, he was directing his mind to disposing of his property in the first instance by giving a portion of it to what are, plainly and beyond doubt, charitable purposes. Then he proceeded to dispose of everything which was left, and he was minded to give his executors the widest possible power to apply his residuary estate, within a certain limit, to such purposes as they might choose to select though of course, if they are not confined to purposes defined as charitable, then the gift cannot take effect at all. In clause 6 he defined the objects of his bounty in the disposition of the residue in this way: "Such charitable institution or institutions or other "charitable . . . . objects "—I am leaving out the other words for the moment—"in England as my acting executors or "executor may in their or his absolute discretion, select." He makes it quite plain, when he refers to institutions, that they at any rate are to be charitable; and when he says, in clause 7, that "the receipts of the treasurer or other proper officer "for the time being of any hospital, home or other institution "shall be a sufficient discharge," it is quite clear that the word "institution" in that clause has reference only to such institutions as are charities, because in clause 6 he has used the words "such charitable institution or institutions." If there were not inserted into this clause the words "or benevolent," there could be no doubt but that this was a perfectly good gift, devoted wholly to charitable objects, to which no objection could be made.

But it is said that the insertion of these words "or "benevolent" renders the whole gift invalid, so that no effect can be given to it at all, and the very large residuary estate must go, not as he intended to various establishments for the good of the public, but to a limited number of people who apparently were not in touch with him at all.

In those circumstances am I constrained by authority to read the words "or benevolent" so as to defeat what I am quite clear in my own mind was his intention? I do not think I am. In this case I am construing this particular will and the particular language which the testator has used. He has shown quite clearly a definite intention to benefit charities in the proper sense of the word. His desire was that his very large residue should be distributed by his executors among

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institutions and hospitals and such like establishments, for their benefit. The reference to those institutions shows a good charitable intention, and though, it may be by a slip, the word "or" was inserted between "charitable" and "benevolent," he did not in my judgment, intend, in this particular case, so to extend the scope of his bounty as to bring within the ambit of the powers of the executors, objects which are not charitable, because the overriding intention of this will is that only those objects are to benefit which are charitable in the strict legal sense.

In my judgment the words "or benevolent" are not sufficient here to control what, I find, was the overriding intention to benefit charities, and the fact that in other cases the words "or benevolent" have been held to control the general meaning of the expression of intention, does not prevent me coming to that conclusion, because the position really only comes to this: In other cases where the words "or benevolent" have been construed, the Courts have come to the conclusion that the intention of the testator was not to limit his bounty to charity in its legal sense, but to give a discretion to apply the gift in question, not only to charitable objects, but also to objects which might not be charitable. If that were the intention of this testator I should come to the same conclusion as was reached in those other cases, but once I am satisfied that when he came to clause 5 and clause 6 of his will he had definitely turned his mind to disposing of his property for charitable purposes, then, in my judgment, that shows an overriding intention which governs the whole purpose and object of the gifts given in those clauses and is sufficient to enable me to say that in this particular case the gift of the residue is not invalid and does not fail, but operates as a good charitable gift.

Solicitors: *Preston, Lane-Claypon & O'Kelly; Thomas Eggar & Son; Treasury Solicitor.*

F. C.

FARWELL J.

1940

*July* 20, 24.

## *In re* MILKING PAIL FARM TRUSTS.

## TUCKER *v.* ROBINSON.

[1940. M. 940.]

*Limitation of actions—Land held by tenants in common before* 1926—*Mortgage—No payment in respect of capital or interest—Whether claim barred—Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 35, *Sch. I., Part IV., para.* 1 (4.).

Before 1926 certain freehold land held by tenants in common in undivided shares was mortgaged to secure the sum of 3000*l.*, but no payments of principal or interest were ever made in respect of the mortgage. Under Sch. I., Part IV., para. 1 (4.), of the Law of Property Act, 1925, the land vested in the Public Trustee. In 1939 certain persons were appointed trustees in his place, upon the statutory trusts set out in s. 35 of the Act, and the land was sold by them for 2026*l.* 14*s.* 10*d.* :—

*Held,* that the claim of the mortgagees was not barred by the Real Property Limitation Act, 1874, s. 8, and that, accordingly, they were entitled to be paid the purchase price.

*In re Landi. Giorgi* v. *Navani* [1939] Ch. 828 followed.

ADJOURNED SUMMONS.

At her death on April 27, 1912, Rebecca Wickham (hereinafter called " Rebecca ") was entitled, in equal shares with her two sisters, Eliza Wickham (hereinafter called " Eliza ") and Charlotte Bromley Wickham (hereinafter called " Charlotte "), as tenants in common to certain freehold property known as " Milking Pail Farm " (hereinafter called " the land "). By her will she bequeathed her share to her two sisters in equal shares absolutely.

On October 13, 1919, Eliza died, and by her will, dated April 25, 1901, she bequeathed her share and interest in the land to Charlotte for life, and after her death to one George Robinson (hereinafter called " the mortgagor ") absolutely.

On September 9, 1921, the mortgagor mortgaged his interest in the land to Charles Cockburn, William Tucker, and Tracy Durnford (hereinafter called " the mortgagees "), to secure the sum of 3000*l.* The deed having recited the wills of Rebecca and Eliza, further recited that the mortgagor was

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expecting to benefit under the will of Charlotte by the gift to him of all her interest in the land. Nothing was ever paid in respect of principal or interest.

On December 20, 1922, the mortgagor was declared bankrupt. On April 14, 1923, Charlotte died, having by her will, dated April 25, 1901, bequeathed her share and interest in the land to Eliza (who predeceased her) for life, and after her death to the mortgagor absolutely.

No assent or conveyance was made or given in respect of the entirety or either moiety of the land before January 1, 1926, and accordingly, under the Law of Property Act, 1925, First Schedule, Part IV., para. 1 (4.), the land vested in the Public Trustee upon the statutory trusts, but the Public Trustee was never requested to act.

On February 24, 1930, the mortgagor died intestate, and an undischarged bankrupt. By a deed, dated February 11, 1939, Charles Tucker and Charles Foulsham, the plaintiffs, were appointed to be trustees of the land in place of the Public Trustee, for the purposes of the statutory trusts affecting it, and they subsequently sold the property for 2026*l.* 14*s.* 10*d.*

The summons was taken out on March 13, 1940, to determine who were entitled to the proceeds of sale.

*G. D. Johnston* for the trustees.

*A. G. Coulson* for the legal personal representatives of Eliza and Charlotte. These defendants make no claim themselves. They admit the question is between the other defendants.

*Roger Turnbull* for the trustee in bankruptcy of the mortgagor. No payment has been made in respect of the mortgage and there has been no acknowledgment. Accordingly, the claim of the mortgagees is barred under s. 8 of the Real Property Limitation Act, 1874.

*McMullan* for the mortgagees. No statutory limitation can apply to this debt by reason of the decision of the Court of Appeal in the case of *In re Landi. Giorgi* v. *Navani.* (1)

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(1) [1939] Ch. 828, 835.

When the Law of Property Act, 1925, came into force the land vested in the Public Trustee (Sch. I., Part IV., para. 1 (4.)) and in 1939 the plaintiffs were appointed trustees in his place. The land was accordingly held on the statutory trusts set out in s. 35.

*Roger Turnbull* in reply. *In re Landi. Giorgi* v. *Navani* (1) was quite a different case arising out of the relationship of trustee and beneficiary. It has no bearing on the case of a mortgage and the statutory limitation applies. This is just the sort of case anticipated by s. 12 of the Act of 1925. [He referred to *In re Edwards' Will Trusts. Brewer* v. *Gething.* (2)]

*G. D. Johnston* referred to the definition of "land" in s. 205, sub-s. 1 (ix.), of the Act of 1925.

FARWELL J. [having stated the facts :] The question which I have to determine is whether the purchase price, which is admittedly less than sufficient to discharge the full amount due under the mortgage, is payable to the mortgagees, or whether, as the trustee in bankruptcy contends, their claim is barred under the Real Property Limitation Act, 1874, s. 8, and accordingly the money must be paid to the trustee in bankruptcy. It is admitted that no part of the principal or interest has ever been paid under the mortgage. By s. 8: "No action or suit or other proceedings shall be brought to "recover any sum of money secured by any mortgage, "judgment, or lien, or otherwise charged upon or payable "out of any land or rent, at law or in equity, or any legacy, "but within twelve years next after a present right to receive "the same shall have accrued to some person capable of "giving a discharge for or release of the same, unless in the "meantime some part of the principal money, or some interest "thereon, shall have been paid, or some acknowledgment of "the right thereto shall have been given in writing signed by "the person by whom the same shall be payable, or his agent, "to the person entitled thereto, or his agent . . . ."

In my judgment, the mortgagees are entitled to the money in

(1) [1939] Ch. 828.

(2) [1937] Ch. 553.

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question and their mortgage is still subsisting. The ground upon which that conclusion is founded is this. Immediately upon the Law of Property Act, 1925, coming into operation on January 1, 1926, the property in question, by virtue of Part IV., para. 1 (4.), of the First Schedule, vested in the Public Trustee, and on February 11, 1939, when the other trustees, the plaintiffs, were appointed, it vested in them upon the statutory trusts. By s. 35 of that Act: "For the purposes of this Act land "held upon the 'statutory trusts' shall be held upon the "trusts and subject to the provisions following, namely, upon "trust to sell the same and to stand possessed of the net "proceeds of sale, after payment of costs, and of the net rents "and profits until sale after payment of rates, taxes, costs of "insurance, repairs, and other outgoings, upon such trusts, and "subject to such powers and provisions, as may be requisite for "giving effect to the rights of the persons (including an incum-"brancer of a former undivided share or whose incumbrance is "not secured by a legal mortgage) interested in the land." That section has been recently considered in the Court of Appeal in the case of *In re Landi. Giorgi* v. *Navani* (1), and the effect of that decision is that, as between persons who prior to the coming into operation of the Act were entitled to land in undivided shares, as from January 1, 1926, no statute of limitations applies at all, because as from that date the proceeds of sale were held upon an express trust in their favour. It was further held that s. 12 of that Act, which might have been thought to lead to a contrary conclusion, did not operate so as to prevent s. 35 from having that effect. It is said that in the present case that decision is not relevant because here I am dealing with a case where the dispute arises out of the relationship of mortgagor and mortgagee and that, in those circumstances, the statute applies and runs against the mortgagees notwithstanding the alteration in the position effected by the Act of 1925. In my judgment, the answer to that contention is to be found in the precise language of s. 35 itself, which in terms includes "an incumbrancer" and in the face of that language it seems to me quite impossible

(1) [1939] Ch. 828.

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to say that the principle of the decision in the case of *In re Landi. Giorgi* v. *Navani* (1) does not apply equally in the case with which I have to deal. In those circumstances there is no statutory limitation to bar the claim of the mortgagees who have a good charge for a sum which is admittedly in excess of the amount representing the proceeds of sale of the property. Consequently, they are entitled to be paid the proceeds of sale and the claim of the trustee in bankruptcy must be rejected. I make a declaration to that effect.

Solicitors: *Haslewood, Hare & Co., for Basset & Boucher, Rochester; Dollman & Pritchard, for Hayward, Smith & Mackey, Rochester.*

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(1) [1939] Ch. 828.

F. C.

# *In re* ORAM.

## ORAM *v.* ORAM.

[1940. O. 393.]

BENNETT J.

1940

*July* 11; *Aug.* 15.

*Administration—Will—Trust for sale and conversion—Power to postpone—Direction to divide residue into two parts—Valuation of estate—Appropriate date.*

A testator having bequeathed all his real and personal estate to trustees on trust for sale and conversion with power to postpone sale, directed them to divide his residuary estate into two parts so that the value of one should exceed that of the other by 30,000*l.* and to hold each part in trust for certain named persons :—

*Held,* (1.) that as the testator did not specify at what time the valuation for the purposes of the division was to be made, the general rule of administration must be applied.

(2.) that as the estate was distributable at the testator's death, the division should proceed on the basis of the value of the residuary estate as at that date, though, where the provisions of a will were such that there must be an interval between the testator's death and the distribution, it might well be that the valuation of the estate to be divided should be made at the date of distribution.

*In re Gunther's Will Trusts. Alexander* v. *Gunther* [1939] Ch. 985 followed.

*In re Wills. Dulverton* v. *Macleod* [1939] Ch. 705 distinguished.

ADJOURNED SUMMONS.

The facts were stated by BENNETT J. substantially as follows: The will of the testator, Arthur Oram, was dated November 2, 1934. He died on March 12, 1937. Probate of his will was granted on June 21, 1937. He was a wealthy man, the net value of his personal estate being sworn at 412,755*l.*

By clause 6 of his will he gave a number of pecuniary legacies exceeding 15,000*l.* in amount. By clause 7 he gave to his trustees the sum of 10,000*l.* upon trust to invest the same in securities authorised by law for the investment of trust funds and settled the sum and the investments representing it upon a grand-daughter, Gwendolen Wheeler, her husband and her children. By clause 8 he gave his trustees a sum of 24,000*l.* upon trust to invest the same in like investments and settled that sum upon a daughter,

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Sarah Rumboll, and her children. By clause 9 he settled 40,000*l.* to be invested in the like investments upon another daughter, Mildred Oram. By clause 10 he directed his trustees to pay to his wife, Alice Oram, a sum of 1000*l.* and also to pay to some named trustees for his wife the sum of 36,000*l.* or to transfer to them investments authorized by law for the investment of trust funds of equal value as certified for the purposes of probate. By clause 13 he directed his trustees to raise or set aside out of his residuary estate within twelve calendar months after his decease such sum not exceeding 5000*l.* as they should in their absolute discretion think fit and to apply the same in the purchase in fee simple in possession free from incumbrances of a freehold dwelling-house to be used as a residence for his wife during her life. By clauses 14, 15 and 16 he declared the trusts upon which such dwelling-house, if purchased, was to be held.

By clause 17 he devised and bequeathed all his real and personal estate to his trustees upon trust to sell the real estate and to sell, call in and convert into money so much of his personal estate as should not consist of money with a power to postpone, for so long as his trustees should think fit, the sale, calling in and conversion of any part of his real and personal estate. The clause also contained a declaration that the income of his personal estate shall from his death be treated as income.

By clause 18 the testator provided as follows: " I declare "that my trustees shall out of the proceeds of the sale, calling "in and conversion of my said real and personal estate and "out of my ready money pay my funeral and testamentary "expenses and debts and the legacies hereby or by any codicil "hereto bequeathed and the duties directed by this my will "to be paid out of my residuary estate and shall stand "possessed of the residue of such moneys (hereinafter called " 'the trust premises' which expression shall include any "unsold real estate or unconverted personalty) upon trust "to divide the same into two parts in such a way that the "value of one part shall exceed the value of the other part "by exactly thirty thousand pounds."

By clause 19 the trustees were to hold the smaller of the two parts in trust for the testator's son, the defendant Alfred Ernest Oram, absolutely. By clause 20 they were directed to hold the larger part in trust to pay the net annual income accruing to one equal half part thereof from and after the day of his death for Briseis Elizabeth Oram, the widow of his late son Daniel John Oram, and, subject to that trust, to hold the said larger part as well the capital as the income thereof upon trust for the benefit of the child or children of his said son Daniel John Oram.

The relevant facts were deposed to in an affidavit of Reginald Rodwell, one of the trustees, filed on April 24, 1940, and were as follows: All the testator's debts and liabilities and all duties payable by reason of his death other than legacy duty falling due on shares of residue were paid. All the legacies given by the will were paid or satisfied. A freehold dwelling-house was bought under the power contained in clause 13 of the will.

On various dates between July 16, 1938, and January 18, 1939, the trustees of the will appropriated to the settled share of residue investments which at the respective dates of appropriation had a book value of 35,812*l.* 7*s.* 1*d.* On the same dates they transferred to Mr. Alfred Oram the same nominal amount of the same investments. They were then in a position finally to divide the testator's residuary estate. This now consisted of a number of investments in the stock or shares of companies, most of which were quoted on the stock exchanges, and a sum of 8140*l.* 2*s.* 7*d.* in cash. The investments had a book value on August 16, 1939, of 100,604*l.* 3*s.* 2*d.* There had been a substantial depreciation in the value of these investments since the testator's death. The ascertained depreciation at March 12, 1939, amounted to 18,125*l.* 5*s.* 9*d.*

The trustees had it in mind finally to divide the testator's residuary estate by appropriating to each share investments comprised in the estate. Some investments and real estate sold in the course of administration produced nearly 3000*l.* less than the value put upon them for the purposes of estate duty.

On these facts the trustees sought by question one of the summons taken out on March 11, 1940: "To have it "determined whether for the purposes of dividing the capital "of the residuary estate of the testator into two parts as "directed by clause 18 of the said will the executors should "proceed upon the basis of—(*a*) the value of the residuary "estate at the date of distribution and attributing to the "larger part investments and cash which on the basis of "the values at the date of distribution exceed investments "and cash attributed to the smaller part of 30,000*l.*; or "(*b*) the value of the residuary estate of the testator as at "the date of the testator's death and dividing the assets to "be distributed between the larger share and the smaller "share in the proportions borne by one moiety of such value "plus the sum of 15,000*l.* to one moiety of such value less "the sum of 15,000*l.*"

*Andrewes Uthwatt* for the trustees. The question arises out of the difficulty in reconciling *In re Gunther's Will Trusts. Alexander* v. *Gunther* (1) and *In re Wills. Dulverton* v. *Macleod.* (2)

*Wilfrid Hunt* for Alfred Oram. The shares in question should be calculated on the basis of the value of the residuary estate at the testator's death. *In re Gunther's Will Trusts* (1) is exactly in point and should be followed. *In re Wills* (2) is somewhat different in that here the estate was distributable at the death. The testator has given a formula for arriving at the fractions of his residuary estate. The beneficiaries were to be entitled to enjoy those fractions as from the date of his death. There was no interval when they had not an interest in them.

*Hillaby* for Briseis Elizabeth Oram. The time when the trustees, having cleared the estate are in a position to distribute what is left is the date when the valuation should be made. *In re Gunther's Will Trusts* (1) is distinguishable. Farwell J. said that such questions depended on the

(1) [1939] Ch. 985.

(2) [1939] Ch. 705.

construction of the particular will in each case and that there was no question of principle at stake in that case. In that will there were hotchpot provisions which completely distinguish it from the present case.

*Myles* for Josephine Oram, a child of Briseis Elizabeth Oram and the late Daniel John Oram. The right date for the valuation is the date of appropriation whenever that may be, that is when the trustees determine upon what allocation of securities to divide up the estate.

*Roger Turnbull* for Daniel Robert Oram, another child. It is unnecessary to discuss the principles laid down in the case of *In re Gunther's Will Trust* (1) or any other cases depending on hotchpot provisions. A rather artificial rule has been applied in those cases and should not be extended to other circumstances.

*J. L. Stone* for Arthur Bryan Oram and Briseis Elizabeth Geraldine Oram, infant children. *In re Gunther's Will Trusts* (1) is distinguishable because in that case the trustees had to equate something outside the estate with something in the estate. Here the problem is different. It is only necessary to follow the testator's direction in the division of the estate.

Alternatively, it is submitted that *In re Gunther's Will Trusts* (1) was wrongly decided as being inconsistent with the established rules of administration and with the decision in the case of *In re Wills.* (2) The right time for the valuation is the date when the residue is ascertained for distribution : *Dr. Barnardo's Homes National Incorporated Association* v. *Commissioners for Special Purposes of the Income Tax Acts.* (3)

*Wilfrid Hunt* in reply.

*Cur. adv. vult.*

BENNETT J. [having stated the facts :] It will be noticed that the testator died more than three years ago. No explanation is given as to why so long a period elapsed before

(1) [1939] Ch. 985.
(2) [1939] Ch. 705.
(3) [1921] 2 A. C. 1, 8, 10.

the plaintiffs were in a position to make the final division of the testator's estate; but no one has complained and so I assume there has been good reason for the delay.

Primarily, of course, the answer to the question depends upon whether the testator in his will has given his trustees any directions as to when any valuation has to be made. If he has, his directions will prevail over any general rule of administration.

In this will there are not, in my judgment, any directions on this point. Clause 17 imposes a trust for conversion upon all the testator's property and in clause 18 the testator declares that, out of the proceeds of conversion, his trustees are to pay his funeral and testamentary expenses and debts and legacies and the duties directed to be paid out of his residuary estates and that they are to stand possessed of the residue of such moneys upon trust to divide the same into two parts in such a way that the value of one part shall exceed the value of the other by exactly 30,000*l.* This language points to a division of money, an operation into which no question of values enters; but the testator in clause 18 says that the residues of such moneys are to be called "the trust premises" and also says that that expression shall include any unsold real or unconverted personal estate, and the language of the final trust in clause 18 is to be noted. The value of one part is to exceed the value of the other part by exactly 30,000*l.*

The question, of course, is, when?

The will, in my judgment, neither expressly nor impliedly gives any directions in that respect. Therefore, the general rule of administration, if there be one, must be applied.

Almost the exact point came before my brother Farwell J. last year in the case of *In re Gunther's Will Trusts. Alexander* v. *Gunther.* (1) It was a case in which the learned judge reserved his judgment before pronouncing his decision. The headnote of the case is as follows: "A testator, having "bequeathed his residuary estate to trustees on trust for "sale and conversion with power to postpone sale, directed

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(1) [1939] Ch. 985.

"the moneys to arise therefrom to be divided into moieties "to be held respectively on certain trusts for the children of "his first marriage and their issue and for the children of his "second marriage and their issue. He further directed that "in the division of the estate certain sums should be brought "into hotchpot :—*Held*, (1.) that, there being nothing in "the will to indicate that the testator had in mind any "date at which the estate should be valued for the purpose "of adjusting the rights of the parties inter se, the matter "must be considered at large; (2.) that inasmuch as the "rights of the parties might vary according to the date "selected and it was desirable that it should not be one "dependent on the energies of the executors, the valuation "should be made as at the death of the testator." In the will of that testator, there was a trust for conversion and a direction out of the proceeds to pay debts, funeral and testamentary expenses and legacies and then divide into two equal moieties. Trusts were then declared of each moiety and there were directions that in the division certain sums were to be brought into hotchpot against each moiety by the persons taking interests in such moiety.

There cannot, I think, be any difference in principle between the date when in such a case the valuation for the purpose of division of that testator's estate had to be made and the date when for the same purpose a valuation has to be made of the late Mr. Oram's estate.

There are three passages from the judgment of my brother Farwell J. that I must read. In the first the learned judge uses this language (1): " There does not appear to be any "reported case in which this question has been decided. It, "therefore, falls to me to consider the way in which the "matter should be dealt with. A question of this sort must "be primarily one of the construction of the particular will "in each case; that is to say, the Court must look at the "will and see whether there is anything in it which indicates "that the testator intended the valuation to be made at "any particular time. There may be provisions in the will

(1) [1939] Ch. 989.

"which, although not expressly stating any particular date, "point to a conclusion as to what the testator did intend. "But in the present case I am unable to find anything in "the will which is sufficient ground for saying that the "testator contemplated any particular date. There is nothing "in the will which I can say indicates that he had some "particular date in his mind. I have, therefore, to consider, "as it were, at large, what is the appropriate date." Then the learned judge uses this language (1): "I have been "referred to a considerable number of authorities in which "this sort of question has arisen with regard to the interim "distribution of income, and the amounts to be brought in "for that purpose, but in my judgment those cases do not "assist me in coming to a conclusion in this matter. This "is a question of the date to be taken for the purpose of "valuing the capital of the estate. Other considerations may "arise when the Court is dealing with income and not with "capital. In those circumstances, it seems to me that I have "to determine this point without the assistance of any decided "case at all." Later the learned judge states the reasons for his decision (1): "The three dates which have been suggested "are, the date of the death of the testator, the date of retainer, "and the date of distribution. Having regard to the fact "that, if a date other than that of the death is taken, it "must depend to some extent upon the individual executors, "it seems to me desirable, if possible, to take one which is "not so dependent. I am not suggesting—I have no reason "to suggest—in this particular case that there has been any "undue delay in the administration of the estate, which was "a large and complicated one, and it may well be that the "matter could not have been dealt with and disposed of "more quickly. But there may be cases in which the "administration is delayed because the executors have not "exerted themselves as they might have done, and are "dilatory in their duties, with the result that the date for "distribution may be postponed and by the postponing of "the date some of the beneficiaries may benefit and some

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(1) [1939] Ch. 991.

"may suffer. That is a position which, in my view, is not "a desirable one, if it can be avoided."

I read that case as one in which the learned judge was laying down a general rule of administration to be applied to the estate of a deceased person which estate was distributable upon death and in which for the purposes of distribution, and only for the purposes of distribution, a valuation of the property comprised in the estate had to be made.

I am bound, I think, to follow that decision, unless I am satisfied that the rule Farwell J. laid down is inconsistent with an established rule of administration generally applied by this division of the Court.

It was argued that the rule laid down was inconsistent with established rules and in particular that it was inconsistent with the decision of my brother Simonds J. in the case of *In re Wills. Dulverton* v. *Macleod.* (1)

In that case my brother Simonds J. was considering which of two well known modes of adjusting the rights of advanced beneficiaries to participate in income accrued between the date of a death and the date of a distribution of capital he should adopt. One well known method is to value the property comprised in the estate at the date of distribution and to add to that value for the purposes of computation the total of the sums advanced. The sum so arrived at is divided into shares and the advances are deducted from the advanced shares. The accrued income is then divided into shares which bear to one another the same relative proportions as do the shares so ascertained in the estate which is to be distributed.

The other method is to defer valuation until the time of actual distribution. When that time arrives, there is added, for the purposes of computation, to the actual income of the estate interest at the rate of four per cent. per annum on the amount of the advances. The sum so arrived at is divided into the required number of shares and the shares of those persons who had been advanced are debited with interest at the rate of four per cent. per annum on their advances.

(1) [1939] Ch. 705.

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There is some conflict of authorities as to which of these two methods is the method to be applied in cases in which there is no express direction in the matter in the testator's will. My brother Simonds decided that the second method was in accordance with the general rule. I will read the headnote of the report which accurately summarises the essential facts and correctly states the decision: "A testator "by his will gave his residuary real and personal estate to "his trustees upon trust as to two equal fifth shares to pay "the income thereof to his widow during her life, and after "her death to hold the same upon the same trusts as those "declared concerning the capital and income of the remaining "three-fifths, which were for division among his children "who should attain the age of twenty-five years or marry "and if more than one in equal shares, except that each of "his sons was to take three times as much as each of his "daughters, and the daughters' shares were settled upon them "and their issue. The will contained a hotchpot clause in "a common form by which the testator declared that all sums "of money and investments and property which he had given "or covenanted to give for the benefit of any child or his or "her wife or husband or issue over 500*l.* at any one time, "should be taken in and towards satisfaction of the share of "such child in his residuary estate and should be brought "into hotchpot and accounted for accordingly. The testator "who left a very large estate, died in 1927, leaving his widow "and five children, all then infants, surviving him. His "eldest child attained the age of twenty-five in 1938, and "shortly afterwards married. The estate consisted mainly of "securities the value of which was quoted on the principal "stock exchanges. The testator during his life had settled "property and investments of considerable but varying "amounts upon each of his five children. The trustees took "out this summons to determine (inter alia) how the income "and accumulations of income ought to be apportioned "among the children, having regard to the hotchpot clause: "*Held*, that interest at the rate of four per cent. per annum less "tax on the capital sums to be brought into hotchpot ought "to be added to the actual income of three-fifths of the "estate as from the death of the testator, and the aggregate "amount of income so arrived at divided into shares (each "son's share being three times each daughter's) and credited "to the respective children subject in each case to the deduction of interest on the capital sums to be brought into "hotchpot, in accordance with the general rule of administration of the Court."

I think in that case it must have followed from the decision as to income that, when the trustees made appropriations of capital to the shares of the testator's children who had attained vested interests, they valued the investments comprised in the estate at the date of appropriation and not at the date of death.

But the present case seems to me to differ from *In re Wills* (1) in this respect, that in the present case the testator's estate was distributable at his death. In *In re Wills* (1) the interests which became distributable were not vested at the death of the testator, but were contingent and there was a long interval of time between death and distribution, because of the provisions in the will. It may well be that in a case where the provisions of a will are such that there must be an interval of time between death and distribution, if a valuation of the estate to be divided has to be made, it must be made, not at the date of death, but at the date of distribution. Where, however, distribution is to take effect at death and for the purpose of distribution a valuation has to be made, it does seem to me, as it seemed to Farwell J., to be convenient to make the valuation as at death.

In my judgment the case I have to decide is not covered by the decision of Simonds J. in *In re Wills.* (1) It is exactly covered by the decision of Farwell J. in *In re Gunther's Will Trusts.* (2) That decision binds me. I must follow it and in accordance with it I answer the first question in the sense of question one (*b*), that the estate must be divided upon the basis of " the value of the residuary estate of the testator as at the "date of the testator's death and dividing the assets to be

(1) [1939] Ch. 705.

(2) [1939] Ch. 985.

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"distributed between the larger share and the smaller share "in the proportions borne by one moiety of such value plus "the sum of 15,000*l.* to one moiety of such value less the "sum of 15,000*l.*"

Solicitors: *Stafford Clark & Co., for Ironside & Co., Leicester*; *Field, Roscoe & Co., for Whetstone & Frost, Leicester.*

F. C.

END OF VOL. AND OF CHANCERY SERIES FOR 1940.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1940, will be as follows :—

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